

# REFORM OF THE EXTRADITION LAWS OF THE UNITED STATES

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## HEARINGS BEFORE THE SUBCOMMITTEE ON CRIME OF THE COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES NINETY-EIGHTH CONGRESS FIRST SESSION ON

**H.R. 2643**  
REFORM OF THE EXTRADITION LAWS OF THE UNITED STATES

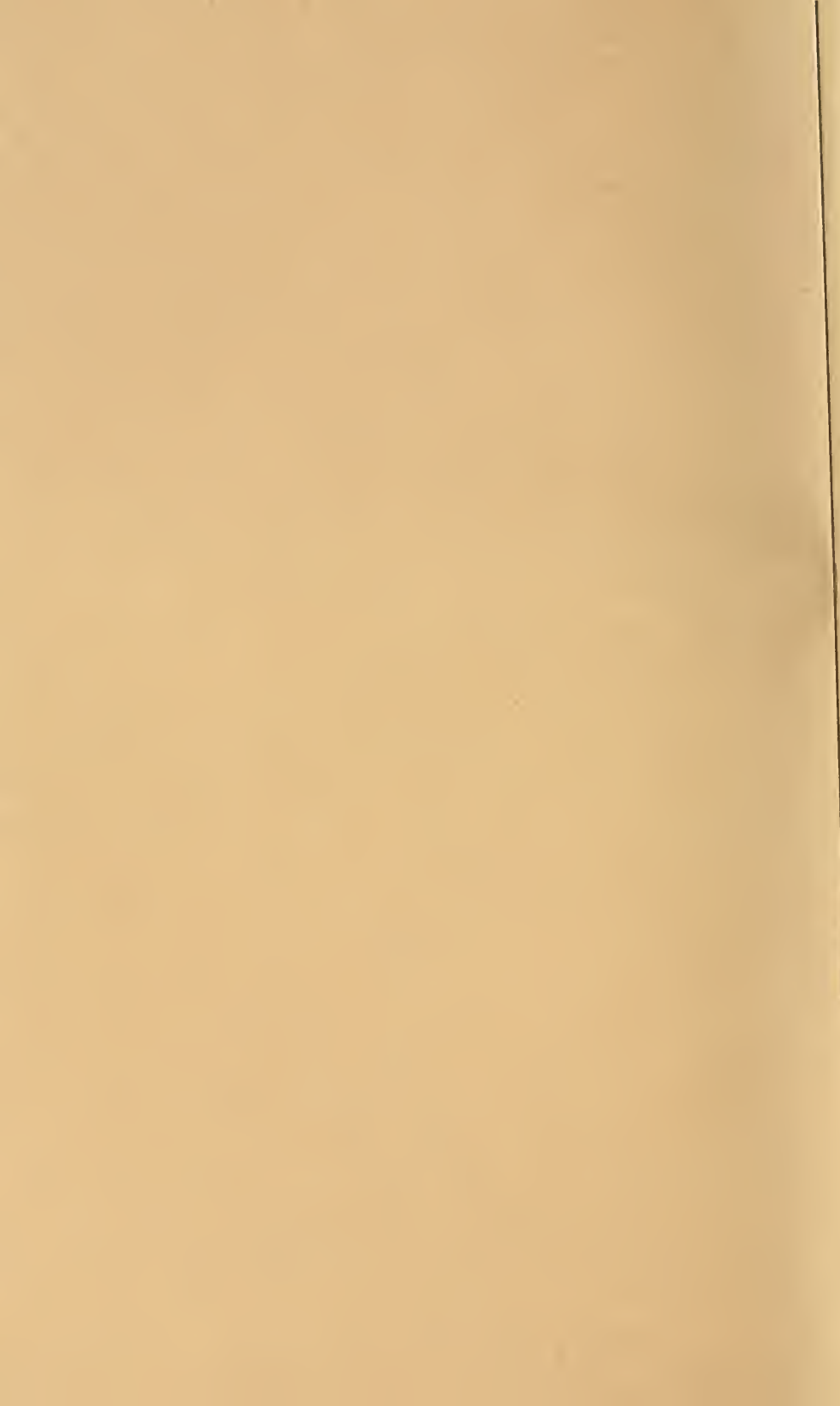
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APRIL 28 AND MAY 5, 1983

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**Serial No. 58**





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NINETY-EIGHTH CONGRESS

FIRST SESSION

ON

**H.R. 2643**

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APRIL 28 AND MAY 5, 1983

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**Serial No. 58**



Printed for the use of the Committee on the Judiciary

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# REFORM OF THE EXTRADITION LAWS OF THE UNITED STATES

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THURSDAY, APRIL 28, 1983

HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON CRIME  
OF THE COMMITTEE ON THE JUDICIARY,  
*Washington, D.C.*

The subcommittee met, pursuant to call, at 1:50 p.m., in room 2237, Rayburn House Office Building, Hon. William J. Hughes (chairman of the subcommittee) presiding.

Present: Representatives Hughes, Smith, and Sawyer.

Staff present: Hayden W. Gregory, chief counsel; Virginia E. Sloan, assistant counsel; and Charlene Vanlier, associate counsel.

Mr. HUGHES. The Subcommittee on Crime will come to order.

Today the Subcommittee on Crime will hold its first hearing on H.R. 2643, a bill to reform the extradition laws of the United States. The bill is similar to the one I introduced in the last Congress, along with my colleague, Hal Sawyer of Michigan, which was reported by the full Judiciary Committee for consideration by the full House.

Unfortunately, with the press of business during the postelection session of the last Congress, the bill was not able to be considered on the floor. We must, therefore, begin anew our efforts to modernize the extradition laws.

I think it is universally agreed that these laws need to be modernized. H.R. 2643 represents the first comprehensive reform of the extradition laws in over a century. It attempts to meet the concern that our current laws are not sufficient to meet the challenges of transnational crime, and that significant legal and practical problems exist under the current structure. H.R. 2643 is an attempt to improve and modernize current law, while at the same time to retain the basic structure of current law.

[The bill, H.R. 2643, follows:]

98TH CONGRESS  
1ST SESSION

# H. R. 2643

To amend title 18 of the United States Code with respect to extradition, and for other purposes.

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## IN THE HOUSE OF REPRESENTATIVES

APRIL 20, 1983

Mr. HUGHES (for himself and Mr. SAWYER) introduced the following bill; which was referred to the Committee on the Judiciary

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## A BILL

To amend title 18 of the United States Code with respect to extradition, and for other purposes.

1       *Be it enacted by the Senate and House of Representa-*  
2       *tives of the United States of America in Congress assembled,*  
3       That this Act may be cited as the "Extradition Act of 1983".

4       SEC. 2. Chapter 209 of title 18 of the United States  
5       Code is amended—

6               (1) by striking out section 3181 and inserting in  
7       lieu thereof the following:

1 **“§ 3181. Payment of fees and costs**

2 “All costs or expenses incurred in any proceeding under  
3 this chapter in apprehending, securing, and transmitting a  
4 fugitive shall be paid by the demanding authority.”;

5 (2) in section 3182, by adding at the end the fol-  
6 lowing: “An agent appointed as provided in this sec-  
7 tion who receives the fugitive into custody is empow-  
8 ered to transport the fugitive to the State or Territory  
9 from which the fugitive fled.”;

10 (3) by striking out “or the Panama Canal Zone”  
11 in the first sentence of section 3182;

12 (4) by striking out section 3184 and all that fol-  
13 lows through section 3195; and

14 (5) so that the chapter heading and the table of  
15 sections at the beginning of the chapter read as fol-  
16 lows:

17 **“CHAPTER 209—INTERSTATE RENDITION**

“Sec.

“3181. Payment of fees and costs.

“3182. Fugitives from State or Territory to State, District or Territory.

“3183. Fugitives from State, Territory, or possession into extraterritorial jurisdic-  
tion of the United States.”.

18 **SEC. 3.** Title 18 of the United States Code is amended  
19 by inserting after chapter 209 the following new chapter:

20 **“CHAPTER 210—INTERNATIONAL EXTRADITION**

“Sec.

“3191. General statement of requirements for extradition.

“3192. Complaint and preliminary proceedings.

“3193. Waiver of hearing.

“3194. Hearing and order.

"3195. Appeal from determination after hearing.

"3196. Surrender of a person to foreign state after hearing.

"3197. Cooperation with transit through United States for foreign extradition.

"3198. Receipt of a person from a foreign state.

"3199. Definitions and general provisions for chapter.

1 **"§ 3191. General statement of requirements for extradition**

2 "The United States may extradite a person to a foreign  
3 state in accordance with this chapter only if—

4 "(1) there is an applicable treaty concerning ex-  
5 tradition between the United States and such foreign  
6 state;

7 "(2) the foreign state requests extradition in ac-  
8 cordance with the terms of that treaty; and

9 "(3) the appropriate court issues an order under  
10 this chapter that such person is extraditable.

11 **"§ 3192. Complaint and preliminary proceedings**

12 "(a)(1) The United States district court for the district in  
13 which the person sought to be extradited is found may issue  
14 an order in accordance with this chapter that such person is  
15 extraditable, upon a complaint filed by the Attorney General.

16 "(2) If the Attorney General has previously sought an  
17 order that a person is extraditable under this chapter with  
18 respect to a specific extradition request of a foreign state the  
19 Attorney General may not file another complaint under this  
20 section based upon the same factual allegations as a previous  
21 complaint, unless the Attorney General shows good cause for  
22 filing another complaint.

1       “(3) If extradition of an individual is requested by more  
2 than one foreign state, whether for the same or different of-  
3 fenses, the Secretary of State may in the discretion of the  
4 Secretary of State determine which request to honor after  
5 consideration of all relevant factors, including—

6           “(A) those set forth in an applicable treaty con-  
7 cerning extradition;

8           “(B) the nationality of the individual;

9           “(C) the state in which the offense is alleged to  
10 have occurred; and

11          “(D) if different offenses are involved, which of-  
12 fense is punishable by the most severe penalty, and if  
13 the penalties are substantially equal the order in which  
14 the requests were received.

15       “(b) A complaint under this section shall—

16           “(1) be made under oath or affirmation;

17           “(2) specify the offense for which extradition is  
18 sought;

19           “(3) contain any matter not otherwise required by  
20 this chapter but required by the applicable treaty con-  
21 cerning extradition; and

22           “(4) either—

23               “(A) be accompanied by—

24                   “(i) a copy of the request of the foreign  
25 state for extradition; and

1                   “(ii) the evidence and documents re-  
2                   quired by the applicable treaty concerning  
3                   extradition; or

4                   “(B) contain—

5                   “(i) information sufficient to identify the  
6                   person sought;

7                   “(ii) a statement—

8                   “(I) of the essential factual allega-  
9                   tions of conduct constituting the offense  
10                  that the person sought is believed to  
11                  have committed; or

12                  “(II) that a judicial document  
13                  authorizing the arrest or detention of  
14                  such person on account of accusation or  
15                  conviction of a crime is outstanding in  
16                  the foreign state seeking extradition;  
17                  and

18                  “(iii) a description of the circumstances  
19                  justifying such person’s arrest.

20           “(c) The Attorney General may file a complaint under  
21   this chapter in the United States District Court for the Dis-  
22   trict of Columbia if the Attorney General does not know  
23   where the person sought may be found. When the person is  
24   found, the matter shall be transferred to the United States



1 district court to which the person arrested is taken under  
2 subsection (d) of this section.

3       “(d)(1) Upon the filing of the complaint under this sec-  
4 tion, the court shall issue a warrant for the arrest of the  
5 person sought, or, if the Attorney General so requests, a  
6 summons to such person to appear at an extradition hearing  
7 under this chapter. The warrant or summons shall be execut-  
8 ed and returned in the manner prescribed for the execution  
9 and return of a warrant or summons, as the case may be,  
10 under the Federal Rules of Criminal Procedure. A person  
11 arrested under this section shall be taken without unneces-  
12 sary delay before the nearest available United States district  
13 court for further proceedings under this chapter.

14       “(2) During the first ten days following the arrest of a  
15 person under this section, the court shall order such person  
16 detained and not order release of such person under section  
17 3199(c) of this title, pending the disposition of the complaint  
18 under this chapter, unless the Government is ready to pro-  
19 ceed under this chapter before the end of such ten-day period  
20 or such person shows by the preponderance of the evidence  
21 that if so released—

22               “(A) such person does not present a substantial  
23 risk of flight;

24               “(B) such person does not present a danger to any  
25 other person or the community; and

1           “(C) no relationship with a foreign state will be  
2       jeopardized with respect to a treaty concerning extradi-  
3       tion.

4       “(3) The ten-day period referred to in paragraph (2) of  
5       this subsection may be extended for successive five-day peri-  
6       ods upon the application of the Government and a showing of  
7       good cause.

8       “(e) The court shall order the release, pending the ex-  
9       tradition hearing, of a person arrested under this section if  
10      there has not been filed with the court before the end of sixty  
11      days after the arrest of such person the evidence and docu-  
12      ments required by the applicable treaty concerning extradi-  
13      tion or notice that such evidence and documents have been  
14      received by the Department of State and will promptly be  
15      transmitted to the court. The court may extend such sixty-  
16      day period for successive periods of fifteen days each upon a  
17      showing of good cause by the Attorney General with respect  
18      to each such extension. In any case, if the applicable treaty  
19      concerning extradition requires such release before the end of  
20      the period otherwise specified by this subsection, the court  
21      shall order such release in accordance with such treaty.

22   **“§ 3193. Waiver of hearing**

23       “(a) A person against whom a complaint is filed under  
24      this section may, with the consent of the Attorney General,  
25      waive the requirements of this chapter for a hearing by in-

1 forming the court that such person consents to removal to the  
2 foreign state requesting extradition. Such a waiver may not  
3 be revoked unless the court determines that an extraordinary  
4 change of circumstances warrants such revocation.

5 “(b) The court shall—

6 “(1) inform a person making a waiver under this  
7 section of such person’s right to representation by  
8 counsel, including counsel appointed without cost to  
9 such person if such person is financially unable to  
10 obtain counsel; and

11 “(2) inquire of such person and determine whether  
12 such waiver is—

13 “(A) voluntary and not the result of threat or  
14 other improper inducement; and

15 “(B) given with full knowledge of its  
16 legal consequences.

17 “(c) If the court determines the waiver is one described  
18 in subsection (b)(2) (A) and (B) of this section, the court shall  
19 order the person making such waiver extraditable and certify  
20 a transcript of the court’s proceeding in the matter to the  
21 Secretary of State. The Attorney General shall notify the  
22 foreign state requesting extradition of the order of extradition  
23 and the time limitation under section 3196(c) of this title on  
24 detention of the person sought. The Attorney General shall,  
25 except as otherwise provided by this chapter, surrender the

1 person so ordered extraditable to the custody of an agent of  
2 the foreign state requesting extradition.

3 **“§ 3194. Hearing and order**

4 “(a) The court shall, as soon as practicable after arrest  
5 or summons of the person sought to be extradited, hold a  
6 hearing to determine issues of law and fact with respect to a  
7 complaint filed under section 3192 of this title unless such  
8 hearing is waived under section 3193 of this title.

9 “(b)(1) At a hearing under this section, the person  
10 sought to be extradited has the right—

11 “(A) to representation by counsel, including coun-  
12 sel appointed without cost to such person if such  
13 person is financially unable to obtain counsel;

14 “(B) to confront and cross-examine witnesses; and

15 “(C) to introduce evidence with respect to the  
16 issues before the court.

17 “(2) The guilt or innocence of the person sought to be  
18 extradited of the charges with respect to which extradition is  
19 sought is not an issue before the court.

20 “(c) The court shall inform the person sought to be ex-  
21 tradited of the purpose of the hearing and of the rights de-  
22 scribed in subsection (b) of this section.

23 “(d)(1) Except as otherwise provided in this chapter, the  
24 court shall order a person extraditable after a hearing under  
25 this section if the court finds—

1           “(A) probable cause to believe that the person  
2 before the court is the person sought;

3           “(B)(i) probable cause to believe that the person  
4 before the court committed the offense for which such  
5 person is sought; or

6           “(ii) the evidence presented is sufficient to support  
7 extradition under the provisions of the applicable treaty  
8 concerning extradition; and

9           “(C) the conduct upon which the request for ex-  
10 tradition is based—

11           “(i) would be punishable under the laws of—

12           “(I) the United States;

13           “(II) the majority of the States of the  
14 United States; or

15           “(III) the State where the fugitive is  
16 found; and

17           “(ii)(I) at least one such offense is punishable  
18 by a term of more than one year's imprisonment,  
19 in the case of a person before the court who is  
20 sought for trial; or

21           “(II) more than one hundred and eighty days  
22 of imprisonment remain to be served with respect  
23 to such offense, in the case of a person before the  
24 court who is sought for imprisonment.

1       “(2) The court shall not order a person extraditable  
2 after a hearing under this section if the court finds—

3           “(A) such person is charged with an offense with  
4 respect to which the limitations provided by the appli-  
5 cable treaty concerning extradition, or, if such treaty  
6 provides none, the limitations of the law of the pros-  
7 ecuting foreign state, on commencement of prosecution  
8 have run;

9           “(B) the applicable treaty concerning extradition  
10 provides an applicable defense against extradition; or

11           “(C) the person has established by the preponder-  
12 ance of the evidence that any offense for which such  
13 person may be subject to prosecution or punishment if  
14 extradited is a political offense.

15       “(e)(1)(A) Upon motion made by the person sought to be  
16 extradited or the Attorney General, the United States district  
17 court may order the determination of any issue under subsec-  
18 tion (d)(2)(C) of this section by a judge of such court.

19       “(B) No issue under subsection (d)(2)(C) of this section  
20 shall be determined by the court and no evidence shall be  
21 received with respect to such issue unless and until the court  
22 determines the person sought is otherwise extraditable.

23       “(2) For the purposes of this section, a political offense  
24 does not include—

1           “(A) an offense within the scope of the Conven-  
2       tion for the Suppression of Unlawful Seizure of Air-  
3       craft (signed at The Hague on December 16, 1970);

4           “(B) an offense within the scope of the Conven-  
5       tion for the Suppression of Unlawful Acts Against the  
6       Safety of Civil Aviation (signed at Montreal on Sep-  
7       tember 23, 1971);

8           “(C) a serious offense involving an attack against  
9       the life, physical integrity, or liberty of internationally  
10      protected persons (as defined in section 1116 of this  
11      title), including diplomatic agents;

12          “(D) an offense with respect to which a multilat-  
13      eral treaty obligates the United States to either extra-  
14      dite or prosecute a person accused of the offense;

15          “(E) an offense that consists of the manufacture,  
16      importation, distribution, or sale of narcotics or danger-  
17      ous drugs; or

18          “(F) an attempt or conspiracy to commit an of-  
19      fense described in subparagraphs (A), through (E) of  
20      this paragraph, or participation as an accomplice of a  
21      person who commits, attempts, or conspires to commit  
22      such an offense.

23          “(3) For the purposes of this section, a political offense,  
24      except in extraordinary circumstances, does not include—

1           “(A) an offense that consists of homicide, assault  
2       with intent to commit serious bodily injury, kidnaping,  
3       the taking of a hostage, or a serious unlawful  
4       detention;

5           “(B) an offense involving the use of a firearm (as  
6       such term is defined in section 921 of this title) if such  
7       use endangers a person other than the offender;

8           “(C) rape; or

9           “(D) an attempt or conspiracy to commit an of-  
10      fense described in subparagraph (A), (B), or (C) of this  
11      paragraph, or participation as an accomplice of a  
12      person who commits, attempts, or conspires to commit  
13      such an offense.

14          “(4)(A) Any issue as to whether the foreign state is  
15      seeking extradition of a person for the purpose of prosecuting  
16      or punishing the person because of such person’s political  
17      opinions, race, religion, or nationality shall be determined by  
18      the Secretary of State in the discretion of the Secretary of  
19      State.

20          “(B) Any issue as to whether the extradition of a person  
21      to a foreign state would be incompatible with humanitarian  
22      considerations shall be determined by the Secretary of State  
23      in the discretion of the Secretary of State.

24          “(f) The court shall state the reasons for its findings as  
25      to each charge or conviction, and certify—



1           “(1) a transcript of its proceedings in the case of  
2       an order of extraditability; or

3           “(2) such report as the court considers appropriate  
4       in other cases;  
5       to the Secretary of State.

6           “(g)(1) Documents at a hearing under this section may  
7       be authenticated as provided—

8           “(A) in an applicable treaty;

9           “(B) in the Federal Rules of Evidence for pro-  
10      ceedings to which such Rules apply; or

11          “(C) by the applicable law of the foreign state,  
12      and authentication under this subparagraph may be es-  
13      tablished conclusively by a showing that—

14          “(i) a judge, magistrate, or other appropriate  
15      officer of the foreign state has signed a certifica-  
16      tion to that effect; and

17          “(ii) a diplomatic or consular officer of the  
18      United States who is assigned or accredited to the  
19      foreign state, or a diplomatic or consular officer of  
20      the foreign state who is assigned or accredited to  
21      the United States, has certified the signature and  
22      position of the judge, magistrate, or other officer.

23          “(2) An affidavit by an appropriate official of the De-  
24      partment of State is admissible in a hearing under this section

1 as evidence of the existence of a treaty relationship between  
2 the United States and a foreign state.

3 “(3) The court may in making its decision consider hear-  
4 say evidence and properly certified documents in a hearing  
5 under this section.

6 “(h) If the applicable treaty relating to extradition re-  
7 quires that such evidence be presented on behalf of the for-  
8 eign state as would justify ordering a trial of the person if the  
9 offense were committed in the United States, the requirement  
10 is satisfied by evidence establishing probable cause to believe  
11 that the offense was committed and that the person sought  
12 committed that offense.

13 “(i) The court shall, upon petition after reasonable  
14 notice to the Secretary of State by a person ordered extradit-  
15 able under this section, dismiss the complaint against that  
16 person and dissolve the order of extraditability if an order for  
17 the surrender of that person to the requesting state has not  
18 been made by the Secretary of State by the end of forty-five  
19 days (excluding any time during which extradition is delayed  
20 by judicial proceedings) after the Secretary of State receives  
21 the certified transcript of the proceedings from the court,  
22 unless the Attorney General shows good cause why such pe-  
23 tition should not be granted.

1 **“§ 3195. Appeal from determination after hearing**

2       “(a)(1) Any party may appeal in accordance with the  
3 Federal Rules of Appellate Procedure applicable to criminal  
4 cases the determination of the court after a hearing under  
5 section 3194 of this title.

6       “(2) Such appeal shall be heard as soon as practicable  
7 after the filing of notice of appeal. Pending determination of  
8 such appeal, the district court shall stay the operation of the  
9 court’s final order with respect to the extradition of the  
10 person found extraditable or the dismissal of the complaint.

11       “(3) Pending disposition of an appeal under this  
12 section—

13               “(A) by either party in the case of a person who  
14 has been found extraditable on any charge, the court  
15 shall order such person detained and shall not release  
16 such person under section 3199(c) unless such person  
17 sought for extradition shows by a preponderance of the  
18 evidence that—

19                       “(i) if so released—

20                               “(I) such person does not present a sub-  
21 stantial risk of flight;

22                               “(II) such person does not present a  
23 danger to any other person or the communi-  
24 ty; and

1                   “(III) no relationship with a foreign  
2                   state will be jeopardized with respect to a  
3                   treaty concerning extradition; and

4                   “(ii) the probability of success of such appeal  
5                   is great; and

6                   “(B) by the Government in the case of a person  
7                   who has not been found extraditable on any charge,  
8                   the court shall order the release under section 3199(c)  
9                   of a person sought to be extradited unless the Govern-  
10                  ment shows by the preponderance of the evidence the  
11                  opposite of any of the things required to be shown by a  
12                  person sought by extradition under subparagraph (A) of  
13                  this section and that the probability of the success of  
14                  such appeal is great.

15                  “(4) The appeal of a case in which the person sought to  
16                  be extradited is not released shall be heard promptly.

17                  “(b)(1) No court shall have jurisdiction to review in any  
18                  proceeding, other than an appeal proceeding under this sec-  
19                  tion, the extraditability of a person appealing under this sec-  
20                  tion until the conclusion of such appeal.

21                  “(2) No court shall have jurisdiction to entertain a peti-  
22                  tion for habeas corpus or a proceeding for other review with  
23                  respect to a finding of extraditability after a hearing under  
24                  section 3194 of this title if such finding has been upheld in  
25                  any previous appeal or an opportunity to appeal was not

1 taken, unless the court finds that the grounds for the petition  
2 or other review could not previously have been presented by  
3 such habeas corpus or other proceeding or, in the case of an  
4 appeal not taken, the court finds good cause existed for not  
5 taking the appeal.

6 **“§ 3196. Surrender of a person to a foreign state after**  
7 **hearing**

8 “(a) If a person is ordered extraditable after a hearing  
9 under this chapter the Secretary of State, in such Secretary’s  
10 discretion, may order the surrender of the person (even if  
11 such person is a national of the United States, unless such  
12 surrender is expressly forbidden by the applicable treaty con-  
13 cerning extradition or the laws of the United States) to the  
14 custody of an agent of the foreign state requesting extradi-  
15 tion, and may condition that surrender upon any conditions  
16 such Secretary considers necessary to effectuate the purposes  
17 of the applicable treaty concerning extradition or the interest  
18 of justice.

19 “(b) The Secretary of State, upon ordering or denying  
20 surrender absolutely or conditionally under this section, shall  
21 notify the person sought, the diplomatic representative of the  
22 foreign state, the Attorney General, and the court that or-  
23 dered the person extraditable. If surrender is ordered under  
24 this section, the Secretary of State shall also notify the diplo-  
25 matic representative of the foreign state of the time limitation

1 under subsection (c) of this section on detention of the person  
2 sought. The Attorney General shall, except as otherwise pro-  
3 vided by this chapter, surrender to the custody of an agent of  
4 the foreign state requesting extradition the person so ordered  
5 surrendered.

6 “(c) The court shall, upon petition after reasonable  
7 notice to the Secretary of State by a person ordered extradit-  
8 able under this chapter, dismiss the complaint against that  
9 person and dissolve the order of extraditability if that person  
10 has not been removed from the United States by the end of  
11 thirty days after—

12 “(1) surrender has been ordered by the Secretary  
13 of State in the case of a person ordered extraditable  
14 after a hearing under this section; or

15 “(2) certification of transcript under section 3193  
16 of this title in the case of a person making a waiver  
17 under such section;

18 unless the Attorney General shows good cause why such pe-  
19 tition should not be granted.

20 **“§ 3197. Cooperation with transit through United States**  
21 **for foreign extradition**

22 “The United States may cooperate in the transit  
23 through the territory of the United States of a person in cus-  
24 tody for extradition from one foreign state to another foreign  
25 state. The Attorney General may hold such person in custody

1 for not more than ten days until arrangements are made for  
2 the continuation of such person's transit.

3 **"§ 3198. Receipt of a person from a foreign state**

4       “(a) The Attorney General shall appoint an agent to  
5 receive, from a foreign state, custody of a person accused of a  
6 Federal, State, or local offense. Such agent shall have the  
7 authority of a United States marshal, and shall convey such  
8 person to the Federal or State jurisdiction that sought such  
9 person's return.

10       “(b) If a foreign state delivers custody of a person ac-  
11 cused of a Federal, State, or local offense to an agent of the  
12 United States on condition that such person be returned to  
13 such foreign state at the end of criminal proceedings in the  
14 United States the Attorney General shall hold such person in  
15 custody pending the end of such proceedings and shall then  
16 surrender such person to an agent of such foreign state unless  
17 the foreign state declines to accept such person.

18 **"§ 3199. Definitions and general provisions for chapter**

19       “(a) As used in this chapter—

20               “(1) the term ‘foreign state’ —

21                       “(A) used in other than a geographic sense,  
22 means the government of a foreign state; and

23                       “(B) used in a geographic sense, includes all  
24 territory under the jurisdiction of a foreign state,  
25 and includes—

1                   “(i) any colony, dependency, or con-  
2                   stituent part of such foreign state; and

3                   “(ii) the air space, territorial waters,  
4                   and vessels and aircraft registered in such  
5                   foreign state;

6                   “(2) the term ‘treaty’ means a treaty, convention,  
7                   or other international agreement that is in force after  
8                   advice and consent of the Senate;

9                   “(3) the term ‘State’ includes the District of Co-  
10                  lumbia, the Commonwealth of Puerto Rico, the Virgin  
11                  Islands, Guam, and the Northern Mariana Islands; and

12                  “(4) the term ‘United States district court’ in-  
13                  cludes the District Court of Guam, the District Court  
14                  of the Virgin Islands, and the District Court of the  
15                  Northern Mariana Islands, and Guam, the Virgin Is-  
16                  lands, and the Northern Mariana Islands are, respec-  
17                  tively, the districts for such District Courts.

18                  “(b) The court may order a person found extraditable  
19                  under this chapter held until surrendered to an agent of the  
20                  foreign state, or until the Secretary of State declines to order  
21                  such person’s surrender.

22                  “(c)(1) A person arrested or otherwise held or detained  
23                  under this chapter shall to the extent practicable, be confined  
24                  in a place other than one used for the confinement of persons  
25                  convicted of crime. A person arrested or otherwise held or



1 detained in connection with any proceeding under this chap-  
2 ter shall be treated in accordance with this subsection and  
3 chapter 207 of this title, except sections 3141, 3144,  
4 3146(a), 3146(b), 3148, and 3150. Proceedings under this  
5 chapter shall be deemed criminal proceedings for the pur-  
6 poses of this application of chapter 207 of this title and the  
7 release of a person under this subsection shall be deemed a  
8 release under section 3146(a) for the purposes of such appli-  
9 cation.

10       “(2) Any person arrested or otherwise held or detained  
11 in connection with any proceeding under this chapter shall, at  
12 such person’s appearance before a judicial officer, be ordered  
13 released pending a proceeding under this chapter on personal  
14 recognizance or upon the execution of an unsecured appear-  
15 ance bond in an amount specified by the judicial officer,  
16 unless the officer determines that at a hearing the Govern-  
17 ment has shown by the preponderance of the evidence that  
18 such a release will not assure the appearance of the person as  
19 required, assure the safety of another person or the communi-  
20 ty, or carry out the obligations of the United States under the  
21 applicable treaty concerning extradition. If the judicial officer  
22 so determines, the judicial officer may, either in lieu of or in  
23 addition to such methods of release, order such person de-  
24 tained after a hearing on a motion for detention under para-  
25 graph (10) of this subsection or impose any of or any combi-

1 nation of the following conditions of release which will give  
2 the required assurances and carry out such obligations:

3       “(A) Place the accused person in the custody of a  
4       designated person or organization agreeing to supervise  
5       such accused person.

6       “(B) Place restrictions on the travel, association,  
7       or place of abode of the person during the period of  
8       release.

9       “(C) Require the execution of an appearance bond  
10      in a specified amount and the deposit in the registry of  
11      the court, in cash or other security as directed, of a  
12      sum not to exceed 10 per centum of the amount of the  
13      bond, such deposit to be returned upon the perform-  
14      ance of the conditions of release.

15      “(D) Require the execution of a bail bond with  
16      sufficient solvent sureties, or the deposit of cash in lieu  
17      thereof.

18      “(E) Impose any other condition deemed reason-  
19      ably necessary to give the required assurances and  
20      carry out such obligations, including a condition requir-  
21      ing that the person return to custody after specified  
22      hours.

23      “(3) In determining which conditions of release will give  
24      the required assurances and carry out the obligations of the

1 United States as required, the judicial officer shall, on the  
2 basis of available information, take into account—

3 “(A) the nature and circumstances of the offense  
4 charged, and the weight of the evidence against the  
5 person accused;

6 “(B) such person’s family and local ties, financial  
7 resources, character, and mental condition;

8 “(C) the length of such person’s residence in the  
9 community;

10 “(D) such person’s record of convictions;

11 “(E) such person’s record of appearance at court  
12 proceedings or of flight to avoid prosecution or failure  
13 to appear at court proceedings;

14 “(F) whether such person is employed or is at-  
15 tending an educational institution;

16 “(G) whether such person is lawfully within the  
17 United States;

18 “(H) the existence of any other requests for the  
19 extradition of such person other than the one with re-  
20 spect to which release is sought; and

21 “(I) whether such person is currently on proba-  
22 tion, parole, or mandatory release under State or Fed-  
23 eral law.

1       “(4) It shall be a condition of any release under this  
2 subsection that the person released not commit any Federal,  
3 State, or local crime.

4       “(5) The Attorney General may appeal from a decision  
5 to release under this subsection to, and seek the revocation of  
6 such release or a change in the conditions imposed with re-  
7 spect to such release in, the court having appellate jurisdic-  
8 tion over the court in which such decision was made. Any  
9 order so appealed shall be affirmed if the order is supported  
10 by the proceedings below. If the order is not so supported,  
11 the court may, with or without additional evidence, modify  
12 the decision appealed. The appeal shall be determined  
13 promptly.

14       “(6) The attorney for the Government may make a  
15 motion for the revocation of the release of a person charged  
16 with violating a condition of release under this subsection.  
17 Upon such motion a judicial officer may issue a warrant for  
18 the arrest of such person and the person shall be brought or  
19 appear before a judicial officer in the district in which the  
20 arrest under section 3192 was ordered. Such judicial officer  
21 shall order revocation of release and detention of such person  
22 if such judicial officer finds—

23               “(A) there is clear and convincing evidence that  
24       such person has violated any such condition of such re-  
25       lease; and

1           “(B) based on the factors set forth in paragraph  
2           (3) of this subsection, there is no condition or combina-  
3           tion of conditions of release that will give the required  
4           assurances and carry out the obligations described in  
5           paragraph (2) of this subsection.

6           “(7) If the judicial officer finds in a proceeding under  
7           paragraph (6) of this subsection that there are conditions of  
8           release that will give the required assurances and carry out  
9           the obligations described in paragraph (2) of this subsection,  
10          the judicial officer shall release the person in accordance with  
11          paragraph (2) of this subsection.

12          “(8) Violation of a condition of release under this sub-  
13          section constitutes a contempt of court.

14          “(9) Whoever willfully fails to appear as required after  
15          release under this subsection shall be fined not more than  
16          \$10,000 and imprisoned not more than ten years.

17          “(10)(A) The attorney for the Government may make a  
18          motion to detain a person not otherwise held who is awaiting  
19          disposition of proceedings under this chapter.

20          “(B) The court shall order such detention after a hear-  
21          ing if the Government shows by a preponderance of the evi-  
22          dence that if such person is not detained—

23                 “(i) such person presents a substantial risk of  
24          flight;

1           “(ii) such person presents a danger to any other  
2           person or the community; or

3           “(iii) a relationship with a foreign state will be  
4           jeopardized with respect to a treaty concerning extradi-  
5           tion.

6           “(11) At a hearing under this subsection, the person  
7           sought to be detained has the rights a person sought to be  
8           extradited has under subsection (b)(1) of section 3194 of this  
9           title at a hearing under such section.

10          “(12) If the court orders detention under this subsection  
11          the court shall set forth in writing its findings of fact and  
12          conclusions of law not later than twenty-four hours after the  
13          order for detention is entered.

14          “(13) Hearings under this subsection, and hearings  
15          under section 3194 of this title, with respect to a person de-  
16          tained under this subsection, shall, insofar as consistent with  
17          the sound administration of justice, have priority over all  
18          other proceedings before the court.

19          “(d) The court shall upon request appoint counsel as  
20          provided in section 3006A of this title for cases to which such  
21          section applies to represent a person whose extradition is  
22          sought, with respect to whom a complaint is filed under this  
23          chapter, and who is financially unable to obtain counsel.

24          “(e) All transportation costs, subsistence expenses, and  
25          translation costs incurred in connection with the extradition

1 or return of a person at the request of the government of a  
 2 foreign state, a State, or the United States shall be borne by  
 3 the requesting government unless otherwise specified in the  
 4 applicable treaty concerning extradition or, in the case of a  
 5 request of the government of a foreign state, the Secretary of  
 6 State directs otherwise.

7       “(f) The Supreme Court of the United States shall pre-  
 8 scribe, from time to time, rules of practice and procedure  
 9 with respect to any or all proceedings under this chapter.  
 10 The Supreme Court may fix the dates when such rules shall  
 11 take effect, except that such rules shall not take effect until  
 12 they have been reported to Congress by the Chief Justice at  
 13 or after the beginning of a regular session thereof but not  
 14 later than the first day of May, and until the expiration of one  
 15 hundred and eighty days after they have been thus  
 16 reported.”.

17       SEC. 4. The table of chapters at the beginning of part II  
 18 of title 18 of the United States Code is amended by striking  
 19 out the item relating to chapter 209 and inserting in lieu  
 20 thereof the following:

“209. Interstate Rendition ..... 3181  
 “210. International Extradition..... 3191.”.

21       SEC. 5. This Act shall take effect on the first day of the  
 22 first month which begins on or after one hundred and eighty  
 23 days after the date of the enactment of this Act, and shall

- 1 apply only with respect to extradition and rendition proceed-
- 2 ings commenced after such taking effect.



Mr. HUGHES. The witnesses we have before us today are uniquely qualified to testify on these issues. In fact, two of them testified before us in the last Congress on the very same issues. Next week the subcommittee will hold its second hearing on H.R. 2643, where we will once again hear from some of the same witnesses who testified last year and also hear from some new witnesses. We hope as a result to gain a good overview of the practical, legal, political and moral consequences of a new extradition law.

I have a more detailed statement which, without objection, I am going to insert in the record.

[The statement of Mr. Hughes follows:]

PREPARED STATEMENT OF CONGRESSMAN WILLIAM J. HUGHES, CHAIRMAN,  
SUBCOMMITTEE ON CRIME

Today the Subcommittee on Crime will hold its first hearing on H.R. 2643, a bill to reform the extradition laws of the United States. The bill is similar to one I introduced in the last Congress, which was reported by the full Judiciary Committee for consideration by the full House. Unfortunately, with the press of business during the post-election session of the last Congress, the bill was not able to be considered on the floor. We must therefore begin anew our efforts to modernize the extradition laws.

I think it is universally agreed that these laws need to be modernized. H.R. 2643 represents the first comprehensive reform of the extradition laws in over a century. It attempts to meet the concern that our current laws are not sufficient to meet the challenges of transnational crime, and that significant legal and practical problems exist under the current structure. H.R. 2743 is an attempt to improve and modernize current law, while at the same time to retain the basic structure of current law.

Many of the changes made by the bill have proved to be noncontroversial; they were readily accepted by all of the interested parties during consideration of the bill during the last Congress. These changes include, for example, a provision authorizing the appointment of counsel for someone sought for extradition, clarification of the matters that must be set forth in a complaint, and authority for both sides to appeal adverse lower court rulings.

There are, however, several other areas that have proved to be more controversial. Most of these issues raise certain human rights concerns. For example, the definition of a political offense—or more accurately, what does not constitute a political offense—has been difficult to draft. The roots of the political offense exception run deep—this country is founded on the principle that a revolution may be necessary to overthrow a tyrannical government. To draft a bill that would require the return of a George Washington to England would be unacceptable. However, unfortunately in modern times, political violence has taken new and almost unthinkable turns. I believe that all parties agree that random acts of terrorism aimed at civilians should not be protected by our extradition laws. However, it is not easy to define precisely what terrorism is. We must be careful that in excluding certain conduct from the political offense definition we do not also exclude other conduct that has traditionally been encompassed within the meaning of that term.

Another issue involves the so-called “rule of non-inquiry.” The question presented is whether the courts should play a role in determining whether the request for extradition is politically motivated, and whether the legal procedures facing the extradited person upon return to the requesting country will be fair. Present law leaves these decisions to the Secretary of State, once a court has found the person extraditable. However, some courts have apparently left room for judicial review of the Secretary’s decision, in cases that might “shock the conscience.” Some interested groups strongly support permitting the courts to make such a review. The administration, on the other hand, believes that the courts should not involve themselves in such matters, and that these concerns are more appropriately left to the discretion of the Secretary of State. The bill, as presently drafted, supports the position of the administration.

The right to bail of the person sought for extradition is another matter of some controversy. H.R. 2643 fills a gap in the current extradition laws, which are silent on the issue of whether the individual is entitled to release prior to the extradition hearing. It sets forth procedures that try to accommodate the individual’s interest in freedom with the interest of the requesting country in seeing the person returned and of the United States in meeting its treaty obligations. It recognizes that in ex-

tradition cases, the considerations surrounding a release decision are usually different from those in an ordinary domestic criminal case. Often, the individual has fewer ties to this country. Flight risk is thus enhanced. Extradition cases often involve crimes of violence; thus danger to the community is also increased. In addition, the United States, by entering into treaties involving extradition with other countries, has committed itself to ensuring the return of those who have committed crimes in those other countries. This is of course not a consideration in a domestic criminal case.

H.R. 2643 also recognizes that the information relating to these factors may be difficult to obtain promptly, because the source of the information is in a foreign country. The bill therefore permits the individual to be detained for 10 days after arrest, unless the person can prove to the court that there is no risk of flight and danger, and that treaty obligations will be protected. Once the 10-day period has expired (and unless the court grants an extension), the burden shifts to the Government to prove that the defendant is a flight risk, or a danger, or that our treaty relationship is jeopardized.

Some parties have advocated applying the Bail Reform Act to such individuals. They argue that placing the burden on the individual permits the courts to detain on less than a probable cause standard. They remind us that many people who are sought for extradition are American citizens, who would not be subject to such detention if they were charged in a domestic criminal case. I recognize that the bill applies a lesser standard for detention in extradition cases whether or not the individual is an American citizen. But I also recognize that the considerations in extradition matters are different from those in domestic criminal cases. The bill attempts to strike the right balance among these conflicting concerns.

There are other, no less important issues to be considered by the subcommittee today. The witnesses we have before us today are uniquely qualified to testify on these issues, and in fact, two of them testified before us last Congress on these same issues. Next week, the subcommittee will hold its second hearing on H.R. 2643, where we will once again hear from some of the same witnesses who testified last year, and also hear from some new ones. We hope as a result to gain a good overview of the practical, legal, political, and moral consequences of our extradition laws.

Mr. HUGHES. The Chair recognizes the gentleman from Michigan.

Mr. SAWYER. I want to say that I am pleased that Chairman Hughes has decided to take this up this early in the session. Everybody seems to be in agreement that extradition reform is long overdue and necessary.

As was stated, we passed it through the full committee and the subcommittee in the last Congress, but it died for want of time on the floor. It came through too late, and I think this time we won't have that problem.

It has some very difficult and controversial aspects—the question of bail during the detention, and the question of a court making a decision on the political exemptions that exist—but these things have to be faced. I am sure that we will process the bill in good order.

I would be very pleased to work closely with both the administration and with the chairman on this bill. Hopefully we can move it out and get it through this floor this time. Thank you.

I yield back.

Mr. HUGHES. Thank you, Mr. Sawyer.

Our first two witnesses will appear in a panel. These gentlemen represent the Departments of State and Justice.

Mr. Roger Olsen, Deputy Assistant Attorney General of the Criminal Division, will represent the Department of Justice. Mr. Olsen received his B.A. degree from the University of California-Berkeley in 1964, his J.D. degree from Boalt Hall School of Law in

1968, and an LL.M. in taxation from George Washington University in 1977.

He was a deputy district attorney in Oakland, Calif.; a trial attorney with the Tax Division with the Department of Justice; and engaged in the private practice of law in San Francisco, as well as in Washington, D.C. His responsibilities for the Department of Justice include supervision over the fraud and appellate sections, as well as the Office of International Affairs.

Representing the Department of State this afternoon is Daniel W. McGovern, Deputy Legal Adviser. Mr. McGovern is a 1970 graduate of the University of California at Los Angeles Law School. From 1970 through 1973 he was a deputy attorney general in the Los Angeles office of the California Department of Justice.

From 1973 until 1981, he was senior research attorney on the staff of Justice William P. Clark of the California Supreme Court. He joined the administration as Deputy Legal Adviser in the Department of State when Judge Clark became the Deputy Secretary of State. In February 1983, he became the Principal Deputy Legal Adviser.

Gentlemen, we are happy to have you with us today. We have your statements, which, without objection, will be made part of the record in full. You may proceed as you see fit. If at all possible, we would like to have you summarize your statements, but you may proceed as you wish.

Mr. Olsen, why don't you begin?

**TESTIMONY OF ROGER OLSEN, DEPUTY ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, DEPARTMENT OF JUSTICE, AND DANIEL W. MCGOVERN, DEPUTY LEGAL ADVISER, DEPARTMENT OF STATE**

Mr. OLSEN. Thank you, Mr. Chairman.

I would like to address my remarks to the bail issues and summarize those very briefly.

The bail provisions that we have been recommending reflect the use of the special circumstances test that the courts have already been applying and we think with a high degree of success.

By recognizing that the courts in this country are traditionally the vanguard for individual rights and liberties, we think that in this area they are very experienced in dealing with problems such as bail.

In the context of extradition requests, the amount of information that the United States receives is rather limited not to the bail issue, but to what information is actually needed for extradition purposes.

Let me focus essentially on the fact that the guilt or innocence of the person requested is not an issue in an extradition proceeding. That is incorporated into 3194(b)(2).

Notwithstanding that, in the bail provisions in the definitions under 3199(c)(3)(a), the weight of the evidence against the accused would be considered. That presents some very great problems for us because the amount and the quantum of evidence we would be receiving would only be that which would satisfy probable cause, the test for extradition itself for the court to rule on. Yet, under



the bail provisions the court would be looking to the weight of the evidence.

In addition to the other facts and circumstances, we would simply never be able, even within the 10-day period of time or otherwise, to be get access to that information, except in the context of establishing probable cause.

I would ask that if there are any specific questions that I be permitted to address those and turn over on the issue of political offense exception to the representative of the State Department and indicate to this subcommittee that the Department of Justice concurs in the position and the remarks on political offense that the State Department has submitted.

Mr. HUGHES. Thank you, Mr. Olsen.

[The statement of Mr. Olsen follows:]

PREPARED STATEMENT OF ROGER M. OLSEN, DEPUTY ASSISTANT ATTORNEY GENERAL,  
CRIMINAL DIVISION, U.S. DEPARTMENT OF JUSTICE

Mr. Chairman and Members of the Committee, thank you for the opportunity to appear before this Committee on behalf of the Department of Justice to express its views on H.R. 2643—a bill designed to modernize the very outdated laws implementing this country's extradition treaties. The Administration also has recognized the need for such legislation, and has included its own extradition bill in the President's Comprehensive Crime Control Act of 1983 which has been introduced in the House of Representatives as H.R. 2151.<sup>1</sup>

Mr. Chairman, as you know, the Criminal Division of the Department of Justice is responsible for advising federal and state prosecutors in preparing extradition requests to foreign countries, processing those requests, and serving as liaison with the appropriate foreign and State Department officials in connection with the execution of those requests. It also is responsible for representing, or supervising the representation of, foreign extradition requests in the federal courts. Consequently, the Criminal Division plays a central role in the execution and litigation of all requests to the United States—the principal concern of H.R. 2151 and H.R. 2643.

Our present international extradition laws were enacted in the 1840's and 1880's to implement extradition treaties in an era in which transnational criminal activity and, therefore, extradition to and from the United States was very rare because of the slowness of international travel and the facilities of international commerce. Indeed, until the 1970's, it was a rare year that the Criminal Division handled more than ten extradition requests to the United States, and a similar number by the United States.

With the tremendous growth of wide-bodied jet international air travel and high speed telecommunications in the past decade, and with the United States' increased realization, during that same period, of its responsibilities to the international community and to itself in effectively combatting the rapidly increasing volume of transnational criminal activity—particularly international narcotics trafficking and terrorism—there has been a corresponding growth in the number of extradition requests by and to the United States. While the volume of such requests seldom exceeded twenty per year prior to 1970, in 1979 we opened 127 extradition cases, and in 1982, 338 cases. The laws designed to deal with international extradition in the world of the "horse and buggy" and "tall ships" simply do not meet the needs of a world in which a criminal can transfer millions of dollars from one country to another in a matter of seconds and can flee half way around the world in less than a day.

The volume of extradition requests we are presently making and receiving, and the expected continued rapid growth in this volume, plainly requires effective United States laws to implement our treaty responsibilities. Present United States laws simply do not fulfill this need. Moreover, because of the substantial translation and transportation costs frequently attendant to international extradition, the cases in which the United States and foreign countries seek extradition are generally among the more important cases being prosecuted by the respective authorities. Approximately one-third of these cases relate to serious crimes of violence, another

<sup>1</sup> Title XIV, Part M.

one-third to serious narcotics offenses, and the remaining one-third to serious white collar crimes.

Both H.R. 2151 and H.R. 2643 would make the following important improvements in United States extradition law:

(1) They would permit the United States to obtain a warrant for the arrest of a foreign fugitive although his location or even his presence in the United States is not known. The entry of such warrants in the National Crime Information Center (NCIC) and the Treasury Enforcement Communications System (TECS) should greatly facilitate the arrest of such fugitives.

(2) They would provide a statutory procedure for waiver of extradition for foreign fugitives apprehended in the United States. This procedure would greatly facilitate the expedited return of such fugitives if they do not wish to contest their extradition.

(3) They would permit the direct appeal of court orders granting or denying extradition rather than forcing fugitives to use the more cumbersome habeas corpus review process and denying any review to countries requesting extradition, except through the extremely circuitous and undesirable route of filing a new extradition complaint before a different judge.

(4) They would establish clear statutory procedures and standards for the handling and litigation of all critical phases of the extradition process.

(5) They would limit access to our courts in extradition cases to those cases filed by the Attorney General.

(6) They would permit the Attorney General to ask for the issuance of a summons rather than a warrant of arrest where he believes there is no risk that the person sought would flee prior to the court's decision.

(7) They would codify the rights of foreign fugitives to legal representation in extradition cases and to the speedy resolution of those cases.

(8) They would stop the United States from being a haven for Americans who commit crimes abroad and who cannot be extradited under many of our older treaties.

(9) They would facilitate the temporary extradition of fugitives to the United States who are serving sentences or being tried in foreign countries.

While we believe that H.R. 2643 makes a number of technical improvements in the Administration's bill, we think that the Administration's bill generally accomplishes the mutual objectives of both bills in a clearer, more direct manner.

Additionally, we believe that legislation designed solely to implement extradition treaties should limit itself to providing the procedures by which the substantive agreements contained in the treaties are to be implemented. In two instances, H.R. 2643 would unilaterally revise the substantive agreements contained in the great majority of United States extradition treaties. These instances concern extradition requests by more than one country for the same person (Section 3192(a)(3)), and the minimum sentence by which an offense must be punishable in order for it to qualify as an offense for which extradition may be granted by the United States (Section 3194(d)(i)(c)). We believe such unilateral revision of our extradition treaties is unwise and inappropriate, and should be avoided.

Our principal objection to H.R. 2643, however, is that we believe the benefits it seeks to achieve would be seriously undermined by the changes it would effect concerning the release of fugitives during the extradition process. Moreover, we believe those release provisions would make it so difficult, if not impossible, for us to meet our extradition treaty commitments that our failure to meet those commitments would have a significant adverse effect on our relations with our treaty partners, and would be especially damaging to our efforts to improve international law enforcement cooperation in general, and to combat international terrorism and narcotics trafficking in particular.

In entering into an extradition treaty, the United States undertakes a solemn commitment to its treaty partners to make every effort to apprehend foreign fugitives located in the United States whose extradition is requested. We further commit ourselves to surrendering to our treaty partners all such fugitives who have been found extraditable by our courts and the Secretary of State. We believe that the excessive liberalization of the conditions of release contained in H.R. 2643 would, with great frequency, prevent us from honoring this latter commitment.

First, the Supreme Court has long recognized that "bail should not ordinarily be granted in cases of foreign extradition."<sup>1</sup> In so ruling, however, the Court held that

<sup>1</sup> *Wright v. Henkel*, 190 U.S. 40 (1903).

despite the lack of any bail provisions in the present United States extradition laws, courts have the inherent implied authority to release persons sought for extradition where the existence of "special circumstances" warrants such release. The Courts have applied this special circumstances test wisely, and we have very seldom been placed in the position of being unable to deliver up a fugitive whose surrender has been ordered. Because the special circumstances test has worked well in practice, it has been adopted, with only minor technical improvements, in the Administration's bill, which was passed by the Senate in the 97th Congress. We strongly urge this Committee to support the Administration bill's approach to the release of persons arrested for extradition and not to attempt to "fix" a problem that does not exist.

Second, both the Committee and the Administration bills provide that, at the Attorney General's request, the court can issue a summons rather than a warrant of arrest in extradition cases. It is our intention to use this summons procedure whenever the person sought presents no apparent flight risk or danger if released. For this reason, we anticipate using it most frequently with respect to American citizens and permanent resident aliens with strong family and economic ties to the community. We believe that our use of a summons rather than a warrant of arrest, where appropriate, will largely ameliorate any concern regarding of the special circumstances test.

Third, extradition, by definition, deals with a class of persons who are fugitives from justice in foreign countries. Although a small minority of them may not be aware of the pendency of charges against them in foreign countries, the vast majority of them fled from those countries knowing that charges had been, or were likely to be, brought against them. Thus, the typical subject of an extradition request has a demonstrated propensity to flee rather than face charges, and in general is likely to continue his flight if released pending extradition. The tremendous relaxation of the standards for release of subjects of extradition requests, which would be brought about by H.R. 2643, would only facilitate such further flight and make the United States an attractive haven for fugitives including international terrorists.

Fourth, by placing the burden of proof on the United States, acting on behalf of its treaty partners, to show that the fugitive will not appear if released pending extradition, or that he will constitute a danger to the safety of another person or the community, if released, the bill in practice would lead to the release of many persons who are likely to be long gone by the time their surrender for extradition is ordered—if indeed their presence during the earlier stages of extradition proceedings permits the case to progress to the point at which an order of surrender can be issued. In this regard, it must be remembered that unlike typical bail hearings in the United States on State or Federal charges, where the prosecution has access to significant information on the accused and can readily obtain the testimony of law enforcement officers who are familiar with him, in extradition bail hearings we are wholly dependent on information furnished to us by a foreign country. The fugitive, however, will be able to testify himself and often obtain local witnesses on his behalf. Given the relative availability of evidence relevant to the issue of the fugitive's release, the burden of proof should remain where the special circumstances test places it—on the person sought. To provide otherwise will greatly undermine our ability to carry out our treaty commitments to be able to effectively guarantee the surrender of fugitives who are found extraditable from the United States.

On behalf of the Administration, I respectfully request this Committee reconsider the wisdom of H.R. 2643's bail provisions, and support provisions of H.R. 2151. The latter provisions will enable the United States to meet its treaty commitments and will further, not undermine, this country's efforts in fostering international law enforcement cooperation—particularly in combatting international terrorism and narcotics trafficking.

Both this Committee and the Administration recognize new extradition legislation is extremely important to the United States ability to meet its international law enforcement responsibilities. Except for the issue of release pending extradition, H.R. 2643 and the Administration's bill are in general accord. It is our hope that the Department of Justice and this Committee can work together to resolve this critical issue so that this important legislation can be enacted.

Mr. HUGHES. Mr. McGovern.

Mr. MCGOVERN. Mr. Chairman and members of the Subcommittee on Crime, I appreciate this opportunity to appear before you to express the Department of State's position on H.R. 2643, the proposed Extradition Act of 1983. In my prepared testimony I will con-



fine myself to the one issue of overriding importance for the Department of State: the political offense exception.

As the subcommittee is well aware, in the last Congress the administration initially supported legislation which would have taken the political offense issue away from the courts and placed it within the exclusive jurisdiction of the Secretary of State.

Accordingly, in hearings before this subcommittee on January 26, 1982, the Department opposed H.R. 5227, a predecessor of the bill you consider today, insofar as it provided that the political offense issue would remain within the jurisdiction of the courts.

In the hearings on H.R. 5227, the Department contended that the courts have failed to develop a definition of political offense that can be applied with consistent results.

The guideline established by H.R. 5227 was too vague to be useful, the Department argued, because it simply stated that certain specified offenses were not normally to be considered political offenses. To tell the courts that murder, for example, is not normally to be considered a political offense, the Department noted, would be to give judges little or no guidance as to when that crime should be considered a political offense.

However, in drafting the political offense provisions of H.R. 2643, Chairman Hughes has, I am pleased to say, made significant changes that satisfactorily resolve the concerns we expressed regarding the treatment of that subject in H.R. 5227.

Instead of using the qualifier normally, H.R. 2643 provides that specified offenses are not to be considered political offenses except in extraordinary circumstances. More importantly, the report issued by the Committee on the Judiciary on the proposed Extradition Reform Act of 1982 makes it clear that the extraordinary circumstances test is a balancing test.

The factors to be weighed in striking the balance include: First, whether the victims were civilian, governmental or military; second, the relationship between the person sought and any political organization and whether the conduct allegedly engaged in was done in furtherance of the group's political goals; and third, the relative seriousness of the offense.

The Department is satisfied that the extraordinary circumstances test, as amplified in the committee report, will provide the courts with sufficient guidance to insure fair and consistent results in the cases involving offenses to which it is applicable.

I am also pleased to note that in drafting H.R. 2643 Chairman Hughes has followed a recommendation made in the last Congress by the Senate Foreign Relations Committee by dividing the list of specified offenses into two groups.

The first group includes offenses such as aircraft hijacking or attacks on diplomats as to which the United States is under a multilateral treaty obligation to either extradite persons charged with such offenses or submit their cases for prosecution. The first group also includes narcotics offenses. With regard to an offense listed in the first group, a court could not, under any circumstances, find such an offense to be a political offense.

The second group, which includes common law crimes of violence such as murder, would be subject to the extraordinary circumstances test. I would note that the extradition legislation proposed

by the administration in this Congress, which is included in the proposed Comprehensive Crime Control Act of 1983, follows this approach.

Having explained why H.R. 2643 is more acceptable to the Department of State than was H.R. 5227, let me briefly address a facet of the proposed legislation that continues to trouble us: The standard of proof which a fugitive would have to satisfy in order to establish a political offense claim.

Like the administration bill, H.R. 2643 places the burden of proof as to the political offense issue on the fugitive. However, H.R. 2643 differs from the administration bill as to the standard of proof.

While the administration bill requires that a political offense claim be established by clear and convincing evidence, H.R. 2643 permits the fugitive to prevail on this point by satisfying a significantly less rigorous standard, the preponderance of the evidence.

Why is the clear and convincing evidence test the more appropriate standard of proof to apply in considering political offense claims? Bear in mind that under H.R. 2643, as under the administration bill, a political offense claim may not be heard unless and until the court determines the person sought is otherwise extraditable.

For the person sought to have been determined otherwise extraditable, the court must have found that there was probable cause to believe that the crime charged was committed and that the person sought committed it.

Bear in mind, too, that if the fugitive then successfully argues that his was a political offense, he will probably escape punishment entirely because the United States rarely has jurisdiction over offenses committed abroad. Under these circumstances, it is, we submit, entirely appropriate to require that a political offense claim be proven by clear and convincing evidence.

The Department has one other substantive suggestion to make with which, I suspect, the subcommittee may more readily agree. H.R. 2643 now lists rape as one of the offenses subject to the extraordinary circumstances test. There are no conceivable circumstances, we submit, under which rape could be properly be found to be a political offense. We have a number of more technical drafting suggestions to make, which we will separately convey to the subcommittee staff.

To change the subject for a moment, I wish to make it quite clear that the Department of State strongly supports the position taken today by the Department of Justice with regard to the bail provisions of H.R. 2643.

In conclusion, the Department wishes to take this opportunity to pay tribute to the invaluable role Chairman Hughes has played in developing and managing extradition reform legislation in the House. With his strong leadership, comprehensive understanding of the subject and willingness to work with all interested parties, we are confident that this subcommittee will report out a bill we can support. We stand ready to assist this important effort in any way we can.

Thank you. I am available for any questions you might have.  
[The statement of Daniel McGovern follows:]



## SUMMARY OF PREPARED STATEMENT OF DANIEL W. MCGOVERN

The Department of State will limit its comments principally to political offense exception. The Department is generally pleased with the formulation of the political offense provision in H.R. 2643. The Department supports the division of extraditable offenses into two categories—those which can never be considered political offenses and those which may be so considered under “extraordinary circumstances.” The “extraordinary circumstances” text, as elaborated by the Committee Report, will aid the courts in fairly and consistently deciding cases which raise this issue. The Department suggests that rape be included in the list of offenses which may never be considered a political offense. The Department prefers the “clear and convincing” test contained in the Administration’s bill and S. 220 rather than the “preponderance of the evidence” test of H.R. 2643 as the appropriate burden of proof for determining the political offense issue. Finally, the Department strongly supports the Justice Department’s position on the bail provisions of H.R. 2643.

## PREPARED STATEMENT OF DEPUTY LEGAL ADVISER DANIEL W. MCGOVERN

Mr. Chairman and Members of the Subcommittee on Crime, I appreciate this opportunity to appear before you to express the Department of State’s position on H.R. 2643—the proposed “Extradition Act of 1983.” In my prepared testimony I will confine myself to the one issue of overriding importance for the Department of State—the political offense exception.

As the Subcommittee is well aware, in the last Congress the Administration initially supported legislation which would have taken the political offense issue away from the courts and placed it within the exclusive jurisdiction of the Secretary of State. Accordingly, in hearings before this Subcommittee on January 26, 1982, the Department opposed H.R. 5227, a predecessor of the bill you consider today, insofar as it provided that the political offense issue would remain within the jurisdiction of the courts. In the hearings on H.R. 5227, the Department contended that the courts have failed to develop a definition of “political offense” that can be applied with consistent results. The guideline established by H.R. 5227 was too vague to be useful, the Department argued, because it simply stated that certain specified offenses were not normally to be considered political offenses. To tell the courts that murder, for example, is not normally to be considered a political offense, the Department noted, would be to give judges little or no guidance as to when that crime should be considered a political offense.

However, in drafting the political offense provisions of H.R. 2643, Chairman Hughes has, I am pleased to say, made significant changes that satisfactorily resolve the concerns we expressed regarding the treatment of that subject in H.R. 5227. Instead of using the qualifier normally, H.R. 2643 provides that specified offenses are not to be considered political offenses except in extraordinary circumstances. More importantly, the Report issued by the Committee on the Judiciary on the proposed Extradition Reform Act of 1982 makes it clear that the extraordinary circumstances test is a balancing test. The factors to be weighed in striking the balance include: (1) whether the victims were civilian, governmental or military; (2) the relationship between the person sought and any political organization and whether the conduct allegedly engaged in was done in furtherance of the group’s political goals; and (3) the relative seriousness of the offense (Report No. 97-627, Part I, pp. 24-25). The Department is satisfied that the extraordinary circumstances test, as amplified in the committee report, will provide the courts with sufficient guidance to ensure fair and consistent results in the cases involving offenses to which it is applicable.

I am also pleased to note that in drafting H.R. 2643, Chairman Hughes has followed a recommendation made in the last Congress by the Senate Foreign Relations Committee by dividing the list of specified offenses into two groups. The first group includes offenses such as aircraft hijacking or attacks on diplomats as to which the United States is under a multilateral treaty obligation to either extradite persons charged with such offenses or submit their cases for prosecution. The first group also includes narcotics offenses. With regard to an offense listed in the first group, a court could not, under any circumstances, find such an offense to be a political offense (Report No. 97-627, Part 2, pp. 4-5). The second group, which includes common law crimes of violence such as murder, would be subject to the extraordinary circumstances test. I would note that the extradition legislation proposed by the Administration in this Congress, which is included in the proposed Comprehensive Crime Control Act of 1983, follows this approach.

Having explained why H.R. 2643 is more acceptable to the Department of State than was H.R. 5227, let me briefly address a facet of the proposed legislation that continues to trouble us—the standard of proof which a fugitive would have to satisfy

in order to establish a political offense claim. Like the Administration bill, H.R. 2643 places the burden of proof as to the political offense issue on the fugitive. However, H.R. 2643 differs from the Administration bill as to the standard of proof. While the Administration bill requires that a political offense claim be established by "clear and convincing evidence," H.R. 2643 permits the fugitive to prevail on this point by satisfying a significantly less rigorous standard—"The preponderance of the evidence."

Why is the "Clear and convincing evidence" test the more appropriate standard of proof to apply in considering political offense claims? Bear in mind that under H.R. 2643, as under the Administration Bill, a political offense claim may not be heard—unless and until the court determines the person sought is otherwise extraditable." For the person sought to have been determined otherwise extraditable the court must have found that there was probable cause to believe that the crime charged was committed and that the person sought committed it. Bear in mind, too, that if the fugitive then successfully argues that his was a political offense, he will probably escape punishment entirely, because the United States rarely has jurisdiction over offenses committed abroad. Under these circumstances, it is, we submit, entirely appropriate to require that a political offense claim be proven by clear and convincing evidence.

The Department has one other substantive suggestion to make with which, I suspect, the Subcommittee may more readily agree. H.R. 2643 now lists rape as one of the offenses subject to the extraordinary circumstances test. There are no conceivable circumstances, we submit, under which rape could be properly found to be a political offense. We have a number of more technical drafting suggestions to make, which we will separately convey to the Subcommittee staff.

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In conclusion, the Department wishes to take this opportunity to pay tribute to the invaluable role Chairman Hughes has played in developing and managing extradition reform legislation in the House. With his strong leadership, comprehensive understanding of the subject, and willingness to work with all interested parties, we are confident that this Subcommittee will report out a bill we can support. We stand ready to assist this important effort in any way we can.

Mr. HUGHES. Thank you, Mr. McGovern.

The gentleman from Michigan.

Mr. SAWYER. I have just a couple of questions.

What is your view of how much discretion the Department would have under the bill to file an extradition proceedings? Suppose the Government of Brazil, for example, wants to extradite somebody and presents their situation to the Department of Justice, which as I understand they will be required to do under the new act.

How much latitude do you view the Department has to say, "Go to the Devil, we don't want to," or whether they are pretty much constrained to go ahead and do it?

Mr. MCGOVERN. Congressman, I don't believe that this bill substantially changes the status quo in that respect. As you indicate to, the Department of Justice, through the U.S. attorney, would represent the requesting country in court, which is the practice in almost all of our extradition cases now. There are some older treaties that permit the requesting country to be represented by private counsel.

Under this bill as under current practice, the Department of State would screen an extradition request. Furthermore, the Department of Justice, as they do now, would under this bill have an opportunity to screen an extradition request for formal sufficiency, and to determine, for example, whether it was supported by probable cause. During these screenings, the Department of State and the Department of Justice would take into consideration any allegations that a request was improperly motivated.

Finally, after a court had determined that the requested person was extraditable, the Secretary of State would, under this bill, have the same discretion that he does now to decide whether or not it was appropriate to surrender the person sought.

In summary, I don't believe that the discretion of the Department of State is significantly affected by this bill.

Mr. SAWYER. You also commented on the standard of proof differential. While I recognize the courts do draw a distinction between "clear and convincing" and "by a preponderance of the evidence," do you really think a judge would or wouldn't, with the same proof, extradite or not extradite based on a preponderance or clear and convincing evidence?

Mr. MCGOVERN. Having worked in an appellate court for many, many years I recognize that with regard to any particular set of facts it may not make a lot of difference what standard of proof you apply. I think perhaps, though, that the imposition of the clear and convincing evidence test would have kind of a hortatory significance, that it would indicate to the judge that it was a burden of some considerable weight.

I think it is appropriate to so indicate to the court because, as I pointed out in my prepared testimony, the consequences of a political offense claim being upheld are quite significant.

It means that a person that the court has found in the extradition proceeding to be probably guilty of the offense—probable cause having been established that he committed the crime—would probably go off scot-free without any trial whatsoever because this country would, in 99 percent of the instances, have no jurisdiction over him. So, I think it is appropriate that the heavier standard be applied. But I concede that in many cases it might not make much difference.

Mr. SAWYER. I just think it would be a nice thing for the judge to have if he decides he is going to deny the political thing on the basis that he doesn't think it has been proved. He can just say it wasn't clear and convincing evidence. If he thinks there is a preponderance of the evidence there, he is not going to extradite, either.

I just think sometimes we lawyers get overly fascinated with these distinctions, but I think that is one we find pretty difficult, to have a given judge decide two different ways on the same evidence based on that being the criterion in the statute. I have tried cases for many, many years, so I am fairly familiar with it.

Mr. MCGOVERN. I see your point, Mr. Sawyer. Nevertheless, I think it would be appropriate for the Congress, through this legislation, to indicate the seriousness with which this decision should be made and the relatively heavy burden that the fugitive should bear.

Mr. SAWYER. I yield back, Mr. Chairman.

Mr. HUGHES. We have a vote on. We will recess, so we can catch the vote, and then we will be right back. I am afraid we are going to have a series of votes. The freeze resolution is up, and I think we are going to be making a lot of trips to the House floor today.

[Recess.]

Mr. HUGHES. The subcommittee will come to order.



While we are waiting for the gentleman from Florida, let me ask, if I might, of you, Mr. Olsen, do you have any figures on how many people sought for extradition are released on bail?

Mr. OLSEN. No; but I can secure those for the subcommittee.

Mr. HUGHES. Would you do that? And also statistics on how many, once released, have jumped bail or committed new crimes while on bail; also, at the same time, how many American citizens fall into either of those categories; and the kind of charges that are filed.

You might also, at the same time, give us some idea of the number of extradition cases filed. The last time I saw it, it was about 300 to 325. Maybe you can furnish us with that information. Give us some idea of the type of offenses where requests were made.

Mr. OLSEN. Certainly. I do know that about two-thirds of our cases are either drug or narcotics related, serious offenses or involving violence. I think that from talking to the staff attorneys that regularly handle these cases, that in the overwhelming majority of the other cases, the fraud cases, the question of bail is really not so important an issue, since the persons sought in these cases either have ties with this country or the likelihood of flight is not particularly viewed as much of a risk. It is really in the other area, but I will certainly have this information pulled together and provide it for the subcommittee.

Mr. HUGHES. You see what we want. We want to know the profile of the types of cases we are talking about, so we can attempt to make a determination as to how much risk is involved in this whole bail area. Aside from the issue of the linguistics that we lawyers get involved in, I would like to see as a practical matter what we are talking about.

Mr. OLSEN. The other factor that is perhaps a little more difficult to plug in is prospectively what we see happening. One of the things that we do see happening as we begin to negotiate treaties with other countries in the extradition area, to begin to establish better working relations, and begin to be more active in terms of a prosecutive effort in international drug, narcotic areas, organized crime, is that the volume seems to be growing geometrically.

From a staffing posture, we see that we are going to have to be increasing our workload substantially. These are mostly in cases where there is a short time fuse, there is a great likelihood of flight or danger to the immediate community, that type of a problem. But I will certainly get that information.

Mr. HUGHES. All right. We appreciate that.

[The information follows:]

GRANTING OF BAIL TO FUGITIVES ARRESTED IN THE UNITED STATES FOR EXTRADITION TO FOREIGN COUNTRIES: 1980-82

Year	Total arrested	Total granted bail	Percent granted bail	Foreign nationals arrested <sup>1</sup>	Foreign nationals granted bail	Percent foreign nationals granted bail	U.S. citizens arrested	U.S. citizens granted bail	Percent U.S. citizens granted bail
1980.....	45	17	37.7	33	11	33.3	12	6.	50.0
1981.....	53	13	24.5	37	6	16.2	16	7	43.8

GRANTING OF BAIL TO FUGITIVES ARRESTED IN THE UNITED STATES FOR EXTRADITION TO FOREIGN COUNTRIES: 1980-82—Continued

Year	Total arrested	Total granted bail	Percent granted bail	Foreign nationals arrested <sup>1</sup>	Foreign nationals granted bail	Percent foreign nationals granted bail	U.S. citizens arrested	U.S. citizens granted bail	Percent U.S. citizens granted bail
1982.....	51	14	27.5	33	6	18.2	18	8	44.4
Total 1980-82.....	149	44	29.5	103	23	22.3	46	21	45.7

<sup>1</sup> There is one fugitive of unknown citizenship in each year included in this category.

Mr. HUGHES. I have some other questions, but I am going to recognize the gentleman from Florida.

Mr. SMITH. Thank you, Mr. Chairman.

I am just curious about something, if one of you gentlemen can answer this. With which major countries in terms of population, economy or strategic location do we not have treaties at the present time?

Mr. OLSEN. The Department of Justice has prepared a publication that lists the countries that we have treaties with, as well as other information. We could certainly go down that and extract which countries we do not have agreements with I think within a day or two.

Mr. SMITH. Do we have any glaring examples of nontreaty status with certain countries?

Mr. OLSEN. Ireland.

Mr. SMITH. We have no extradition treaty with Ireland?

Mr. McGOVERN. That is one example. That, however, may be remedied pretty soon. I am due to leave in a week for Ireland, and we hope to be able to complete our extradition treaty negotiations with Ireland at that time.

I confess that I cannot give you a satisfactory answer, trying to go through all of the major countries in the world and picking out which ones we might not have a treaty with.

Mr. SMITH. What accounts for the major increases? Mr. Olsen, on page 2 of your testimony you noted 338 extradition cases in 1982 as opposed to the seventies, where we were doing just a few a year. What are we attributing that increase to?

Mr. OLSEN. I don't think there is any one thing that you can point your finger at, but it seems to be an overall recognition that there is a greater need for international law enforcement cooperation. The world is getting smaller, and it is much easier to perpetrate crimes through the use of different jurisdictions.

What we have found is that by going out and discussing informally or formally with other countries just the problems that we are facing and telling them what our needs are and how can we help them, that there is an almost explosion of recognizing the problems, wanting to work together and solve the problems.

I think, too, that the United States was perhaps ahead of the world in terms of drug-related problems and that now that problem is becoming more and more international in nature. We see that we are all potentially exposed, and that the only way we can begin to get some control on it in a way that doesn't expose the rest of

our society to these problems is by working together by an international community effort. That is where we seem to get more and more statements of recognition by foreign countries to want to cooperate.

Mr. SMITH. Do we have more requests for extradition emanating from our end or more requests from the foreign governments, at the present time?

Mr. OLSEN. We certainly have more requests from our end relative to what we had before. We have more requests from foreign governments to the United States than we had before. I don't know in comparing which one is greater. My sense of it is that, as is usually the case, the U.S. requests are usually greater.

We are also finding that many of our State and Federal prosecutors are now becoming aware that it is possible to get information from abroad, thereby to make cases, and as we make better cases, then we are able to make extradition requests for people who have become fugitives from the United States.

Mr. SMITH. In relation to the drug situation, which obviously is at least one of the things spurring the increase, in the area of South America, which I would imagine is the most fertile area for our requesting extradition, are we finding those countries to be receptive to our requests and are they cooperating in their judicial system and through their foreign departments with our requests? Are we running into some brick walls, like we used to: Colombia, Venezuela, Argentina, Bolivia?

Mr. OLSEN. I see that we are making progress, particularly at the police level, in the form of getting information about where people may be, locating them, and attempting to secure their extradition back to the United States to stand trial; that we get more assistance now in the form of information and evidence that we can use in our courts against a lot of these people.

By developing and actually being able to complete the investigation, we are able to make more extradition requests. There is a tremendous interrelationship there, that we are also providing information to foreign countries and assisting them.

I know, for example, one area that is rather unique is what the Swiss are doing now in terms of assistance in the drug area. They now are freezing accounts and prohibiting any movement of bank accounts where information has been brought to their attention that the accounts are being used by people who are engaged in narcotics trafficking. By holding judicial proceedings in Switzerland, they are actually causing forfeiture of those accounts.

Mr. SMITH. To whose benefit? The Swiss Government?

Mr. OLSEN. It is a strictly Swiss Government initiative. It is a Swiss judicial proceeding.

Mr. SMITH. So that even if the United States were the victim or its citizens were the victims and a large amount of money was funneled out of the United States from drug transactions, the Swiss Government, through the information we supply them, are ultimately the beneficiaries of these large amounts of cash? Nobody opens up Swiss bank accounts for a few hundred dollars, so there must be large amounts of cash involved.

Mr. OLSEN. Yes; but it is not in areas where we have identifiable U.S. victims. We don't have in drug cases victims who are identified—

Mr. SMITH. I use that term advisedly, you must understand.

Mr. OLSEN. Right. We look at this as a rather dramatic, innovative approach on the part of the Swiss to cooperate in a way—it takes the profit out of it. On the issue of whether we get it or they get it, my argument has been to all of our lawyers, listen, that is the incentive and the carrot for the Swiss to help in part.

If that works, fine. We have asked other countries to look to their own legal institutions to see whether or not they can do that. They are doing the same thing: looking at it to decide how that can work. That is part of the whole international cooperative effort.

Mr. SMITH. I have one last question. You talked to me about local police cooperation in other countries. I asked you about cooperation of the foreign departments of their countries, their comparable state departments, and the court system with reference to our extradition requests to them.

Are we seeing cooperation at that level? Not at the local police level, but the higher up level.

Mr. OLSEN. Yes; I am saying at both levels.

Mr. SMITH. Thank you, Mr. Chairman.

Mr. HUGHES. Thank you.

Mr. McGovern, a large number of extradition treaties to which the United States is a party contain provisions allowing the United States to decline to extradite a person who establishes a defense based on double jeopardy or immunity from prosecution.

Should these procedural protections be extended by statute to all extradition proceedings?

Mr. MCGOVERN. I am trying to recall, Chairman Hughes, whether that might have been one of the questions that was asked by the subcommittee last year. In the questions that the subcommittee asked the administration witnesses following the extradition hearings last year, the followup written questions, that was one of the questions. It was question No. 4. Rather than take the subcommittee's time now to repeat our answer I would direct your attention to the report of the hearings before the subcommittee on H.R. 5227, "The Extradition Reform Act of 1981."

Mr. HUGHES. Your response would be the same as last year?

Mr. MCGOVERN. Yes, it would be. The answers appear beginning at page 169. That particular answer would be on pages 169 and 170 in brief, the administration does not believe that statutory provisions mandating denial of extradition on grounds of double jeopardy or immunity from prosecution are necessary or wise.

Mr. HUGHES. Should an extradition bill provide procedures for cases where more than one country requests an extradition? As you know, H.R. 2643 sets forth such procedures in one section of the bill. What is your opinion of that particular provision?

Mr. MCGOVERN. Again, as I recall, that was a question that was asked of the administration witnesses last year. Again, as I recall, the administration took the position that it was not necessary for there to be a provision on this point because it was covered by many of the extradition treaties that we have. We felt largely it would be redundant.



Mr. HUGHES. Correct me if I am wrong. Not all of the treaties do provide for that. In last year's bill there was no such provision. We do have one in this year's bill, so my question is, as long as all the treaties do not contain such provision, would it not be advisable to so provide?

Mr. MCGOVERN. Again, I would refer the committee to the answers provided by the administration witnesses last year. I believe that was question seven. The answer to that question appears on page—

Mr. HUGHES. Why don't you be redundant and tell me what your position is?

Mr. MCGOVERN. On page 171 of the report of hearings of this subcommittee on H.R. 5227 the administration answered at that time:

When the United States receives extradition requests for the same person from two or more countries, the Secretary of State decides which nation's request will be given priority. The starting point for the Secretary's analysis is always the terms of the applicable extradition treaties.

Many of our treaties provide that the preference be given to the request received first. Others provide priority to the country whose request involves the more serious offense. Still others contain lists of factors to be considered in deciding the issue. Some simply acknowledge the discretion of the requested state to decide the issue.

If the treaties do not contain an answer or are themselves in conflict, the Secretary considers a wide variety of factors ranging from the comparative likelihood of each request's success on the merits to the probable disposition of the fugitive after surrender. The Secretary may always weigh the state of our diplomatic relations with each of the countries involved.

We do not believe that the list of factors contained in the OAS convention should be inserted in the statute.

Which was incorporated in your question last year.

There are several reasons for this view.

Then we go on to list those reasons.

I think it only fair to say, however, that, as I recall, the relevant provision incorporated in the legislation this year lists the factors set forth in applicable treaty provision as the first set up factors to be considered.

Insofar as the treaty provision is given deference, I think that would largely remove any objections that we had. Nevertheless, I would have to maintain the position that we have taken before on the record, that we don't think that it is necessary that there be such a provision in the legislation.

Mr. HUGHES. Should extradition proceedings be stayed with respect to a person who has sought political asylum until there has been final action on the asylum application?

Mr. MCGOVERN. Thank you, Mr. Congressman. That is another question that was asked of us last year. If I may, I will provide the answer that we did at that time, which appears at page 176 of the report of this subcommittee's hearings on H.R. 5227.

Mr. HUGHES. If you could shorten it and just tell us how your position is this year. You had a lot of positions last year, but you changed some of them.

Mr. MCGOVERN. We did change some of them.

Mr. HUGHES. Our positions are much more similar this year that they were last year about this time.



Mr. McGOVERN. I recognize that, and I think that indicates a spirit of admirable flexibility on the part of both of the legislative and executive branches.

Mr. HUGHES. It sure does. We look forward to continuing to work with you.

Maybe you could just briefly tell me, What is your general position with regard to political asylum? Should those proceedings be stayed?

Mr. McGOVERN. Our position is that extradition proceedings should not be stayed until final action is taken on an asylum application.

Mr. HUGHES. They should not be.

I realize that we dealt with the rule of specialty last time. Should any extradition legislation include the rule of specialty?

Mr. McGOVERN. Again, we don't feel that it is necessary that the rule of specialty be provided for by the statute.

Mr. HUGHES. Do I take it from that that if a rule of specialty is spelled out, it would not do any particular violence to the law?

Mr. McGOVERN. Our position is that it is redundant, but since the treaties have such a provision, a properly drafted provision would not be objectionable.

Mr. HUGHES. Mr. Olsen, one of the problems that Justice has a great deal of concern with, as I understand it, is the bail provision. Maybe you can tell me what it is about the "special circumstances" test that has been carved out by the courts on a case-by-case basis that gives you such assurance that you would rather stay with that than try to develop a procedure that is legislative, that is balanced and based upon experience. That is what we have tried to do with the standard that we have set forth in the bill.

Mr. OLSEN. Having spent quite a bit of time on this issue, I think the theory and where we have developed our position is based on years of practical experience and knowing that the courts are really going to be applying standards that they are very familiar and comfortable with, basically a facts and circumstances test.

There is nothing magical about what factor is going to be more important in any one particular case. That will depend. The judges who will be looking at bail issues in the extradition area do this day in and day out. In a sense, they truly become expert in it.

They are also traditionally recognized as the vanguard of political and individual rights and liberties, which is one reason why I think there is a tremendous movement to place the political offense exception in the courts, and not someplace else.

It is rather anomalous to me that there would be the position that the courts ought to decide political offense, because they are really going to be looking out to protect the individual. At the same time, you don't want to give that same judge the authority to decide whether to release that person on bail or keep him in custody.

On the question of whether or not there is some kind of unreasonable detainer because there has not been some probable cause established for detaining them, I think what we have to recognize is that before we get the request a foreign government has made a decision to seek the extradition for an offense that is serious in nature, that they are going to meet the test of the U.S. law as well

as the treaty obligations, and that we are responding as a matter of comity to that foreign country——

Mr. HUGHES. I understand all that.

Mr. OLSEN [continuing]. And that some other magistrate or the equivalent has made some decision about the guilt or innocence enough to warrant that request coming over. I think that what we are really saying is that the United States in extradition requests is responding.

We are in the middle of the proceeding. We only have as much information as we get according to what is required by the treaty, not according to what may be necessary for bail. We are not trying the issue on guilt or innocence. We are only trying to establish probable cause, to believe this is the person who maybe committed the offense.

Mr. HUGHES. Isn't that going to be a problem no matter whether you use a special circumstance test or whether you use a test as set forth in the bill, where for 10 days the defendant has the burden of establishing that he or she is not a flight risk, doesn't present a danger, or has sufficient ties to the community and so forth, and that after 10 days it switches to the government?

Isn't that going to still be a practical problem no matter what test you use?

Mr. OLSEN. I just don't think that as a practical matter we are really going to be able to get that information from foreign countries in 10 days or in some other period of time. You are going to actually change the nature of the proceedings itself.

Mr. HUGHES. It seems to me that as a practical matter the court is going to look at the available evidence, whether it is a special circumstance test or whether it is the test that we have set forth in the bill to make a determination on just what evidence is introduced about whether the person is a flight risk.

I think judges have demonstrated that they are aware that there is more at stake than just the question of whether the defendant will flee. It is the question of comity with other countries. Our own credibility is on the line when we are requested to produce a defendant and we mess up and we can't produce.

In the final analysis, isn't the court going to take that into account in the same way that Hal Sawyer asks about "clear and convincing" as opposed to a "preponderance" test? Aren't we talking about semantics more than anything?

Mr. OLSEN. I think in the case of the clear and convincing test on the political offense exception what we are talking about is sending a clear message to the courts that yes, on the issue of probable cause and those issues that have to be resolved before you get into political offense, you do have a different standard or threshold. But this area is of more significance to the United States of America, and we are sending a message to the courts to not just balance.

On the issue of bail, I think we are much closer together in terms of our position. I think, for example, that having the facts and circumstances defined in the definitions does provide guidance. I don't have any trouble with that. I think in terms of what happens initially with the proceeding, as long as it is based on reason, that makes a great deal of sense to me, that the court then takes over.

What I have difficulty with is that within some 10-day mechanical period of time the rules are somehow going to change and now we are going to be shifting.

Mr. HUGHES. It is working on the assumption, Mr. Olsen, that in this day of telecommunications—and we are not talking about the old steamboats—the jurisdiction that makes the request, that has all the information, has to work with the Department of Justice. I wouldn't assume you would bring an extradition case until you are ready to move to begin with.

It seemed to me today 10 days would be a pretty adequate period of time to get the necessary information. If anybody is at a disadvantage, it would seem to be the defendant, who might be present outside that jurisdiction, not aware of all the circumstances, and perhaps not have been back in the jurisdiction of the requesting State for a long period of time.

I wouldn't think that the requesting State would be at a disadvantage, and certainly there are no impediments to that jurisdiction, working with the Justice Department, furnishing you the information that you need.

Mr. SMITH. Mr. Chairman, would you yield for a second?

Mr. HUGHES. I would be happy to yield.

Mr. SMITH. Would you be getting basically to the point that if in fact the request for extradition is made and somehow the attempt for further information to allow the court to make a determination on the question of bail would get hung up at some point in the proceeding between us and a foreign country, where people could really languish in jails for long periods of time, at a period when we really have no ability to pull them out of that situation without their shifting the burden to the State to determine whether or not that person is a flight risk. It seems to me under your theory, in fact, there could be a deliberate absence of flow of information, causing people to remain incarcerated when they might otherwise be releasable; that your logic would be that if the other country requesting extradition fails to cooperate at that point in time, then in fact there is a shift of the burden, and the people who are languishing might be able to get out if they, in fact, are not provable as a special risk.

Mr. OLSEN. Congressman, I am not aware of any situation that you address your question to, where someone has languished in jail or been incarcerated for a substantial period of time while we are working out and trying to get information on that type of an issue.

The extradition proceedings are perhaps slightly different in that at the point in time that the United States is prepared to file extradition papers in court, those papers have already been reviewed and evaluated by two separate Departments of the Federal Government: The State Department and the Justice Department. Therefore, at that point in time we are ready to go forward.

Mr. HUGHES. I have to stop you there. We have a vote to catch. I apologize. We will pick up where we are when we come back.

The hearing is recessed.

[Recess.]

Mr. HUGHES. The subcommittee will come to order.

I apologize again for that delay. Mr. Olsen, you were in the middle of responding to Mr. Smith.

Mr. OLSEN. Thank you, Mr. Chairman.

I think that what is probably a more effective alternative is to have a legislative message to the courts in this area of bail that gives them some guidance about what can and can't be done.

I think that attempting to outline the various facts and circumstances that the court ought to take into consideration without there being any necessary weighting to any of the particular items would be helpful, but I think that the history of bail proceedings in our courts is really one where regardless of what happens on day one, the defendant or the requested person, in this case, can always come back to the court and renew that request.

We were discussing during the break some of the problems that might come up, for example, in terms of what kind of information might even be possible within this 10-day period of time. One of them, for example, would be a cable, nothing more, simply a cable from a foreign government, whatever the law enforcement agency is, perhaps even through Interpol, that would be of the kind and character that a court in this country would want or could use for purposes of bail.

I think the problems are very practical ones, but I think in terms of where the bulk of our requests and where our extradition matters are, I think that the statistics will show that the bulk of them come from Canada, West Germany, and the United Kingdom; that in terms of a management problem or a problem with the courts, I really don't see that there is any question about the integrity of those legal institutions.

Mr. HUGHES. Wouldn't you have the same practical difficulty whether you use the special circumstances test or the test set forth in the bill or some modification of that? In the first place, I would think that Justice would not move ahead with an extradition proceeding until you had sufficient information to actually file a complaint and secure a summons or a warrant, to begin with.

Mr. OLSEN. Yes.

Mr. HUGHES. Second of all, the information bearing on the question of bail is going to be the same whether you use the special circumstance test or the standards set forth in the bill. We have a mechanism we have never had before which permits the Justice Department to appeal a decision if, in fact, you are not in accord with a court's decision. You run the same risk, under the special circumstance test, in fact, maybe even a greater risk, because of its vagueness.

I would venture to say that one of these days you will go before a judge who is going to give you a decision that is not to your liking. I would think there is more likelihood of that happening with the special circumstance test than where you try to develop a standard, create the burden of going forward and indicate who has it. It would seem that the formula that we have set forth in the bill would be less likely to end up with a disaster on the State Department's hands, and Justice's, than under the very ambiguous special circumstance approach.

Mr. OLSEN. The special circumstance test is not a metaphysical, theoretical concept. It is one that we think is—and I think the subcommittee would agree—really one that when you look at each



case, based on all the various circumstances and factors and tests that we have attempted to put into the various bills——

Mr. HUGHES. How would you describe the difference between that and what we have tried to set up in the bill? The only thing we have done in the bill is we have said:

Look, Mr. or Ms. Defendant, it is your responsibility during the first 10 days. During that period of time you have more of an opportunity to develop information which would give us your background. Tell us your family ties, your employment ties, and other circumstances which would bear on the relevant issues. After that 10-day period of time, the Government should have ample information to move ahead.

The burden is the only thing that I see as a practical matter is going to make any difference, except that what we have endeavored to do is provide a format and a procedure to be followed.

Mr. OLSEN. I think you are correct that the shifting of the burden is really the focus of the issue in the bail area. In terms of my own background, sometimes we have gotten tired of the number of requests that an individual defendant may make for renewing a request for a reduction of bail or release on his own recognizance, but I have always been impressed that the courts are always willing to give that person the opportunity to make that request.

As long as the individual has that opportunity in this area, I have remained convinced that he or she should have the burden of coming forward with evidence or information about the ties he or she may have in the United States which we, at the present time, have no institutional ability to secure.

We would have to literally open up an investigation to find out who that person is and what they are doing in the United States with respect to the ties, business activities, and things like that, and would face some rather insurmountable barriers.

Mr. HUGHES. Let me just carry that to its practical conclusion. Let's say a defendant is not cooperative and it is hard to find any information about this individual. You can't find out where he is employed, you can't find out any family circumstances, can't determine really how long he has been in the country.

Under those circumstances, isn't that sufficient for any court to determine that a defendant would be a high risk?

Mr. OLSEN. There were a number of cases that I recall bail situations in Berkeley, Calif., where the person coming before the court was described as nothing more than male/white/nomad. The courts rather uniformly restricted the access of those people to early release, until they had some idea that the persons would be likely to appear back in court.

I agree with you in terms of the question that you have asked, that the courts would instinctively react that way. I am just a little troubled by this 10-day requirement and that somehow the burden is going to shift.

It seems to me that the requested person really is a repository of the information that is needed in terms of his or her ties in the United States. We act really only as an intermediary of a treaty partner attempting to establish nothing more than probable cause. Our responsibilities are really very limited in that respect.

Beyond that, we do then become obligated to do more than that and to change some of the rules. The rules really in the area of nonviolent criminal activity are with respect to people that we are trying to make a decision about the likelihood they will flee, the con artist, if you will.

The other cases, the case involving violent crimes, the cases involving drug activity I think the courts have a pretty good handle on. In the United States, when you have persons accused who are U.S. citizens or clearly have U.S. ties, who are accused of crimes involving fraud, there is very little likelihood that they pose a threat to the community or that they are going to flee.

In the international transaction area, you do have very different concepts because there the people may be very likely to have ties or the ability to get outside the United States and to flee to either a nontreaty country or someplace else. That presents some rather difficult problems.

Mr. HUGHES. That presents problems now. Under the present special circumstances test, that presents a problem. There is always that risk. What I understand you have some concern with is the 10-day presumption, that after 10 days you will have sufficient information to carry the burden. That is where your trouble stems from, as I understand it.

Mr. OLSEN. Yes, sir.

Mr. HUGHES. Let me ask you this, Mr. McGovern. It is very difficult, as you know, to define the concept of political offense. The approach taken by the legislation in both the House and the Senate has been to define instead what is not a political offense.

Even so, there is concern that by excluding certain conduct from the reach of the political offense doctrine we may exclude other conduct that has traditionally been protected; for example, by excluding crimes of violence, such as acts of violence committed by a handgun, except in extraordinary circumstances.

By so defining and excluding, are we making the exclusion too narrow? Let me give you a for instance. Suppose Mr. Walesa is imprisoned in Poland, he uses a handgun to escape and someone is injured in the process. Should that be considered a political offense?

Mr. MCGOVERN. Mr. Chairman, I hope that you will not insist that I judge a hypothetical situation.

Mr. HUGHES. Let's do it without naming an individual. Let me rephrase the question. Let's take an individual in a Third World country, who obviously has been singled out by the government, and who is part of a widespread movement within that country to try to change some of the human rights and other violations in the country. The person is constantly harassed by officials in that country, is finally imprisoned, without any basis, any charges, and escapes, using a handgun, and one of the jailers is shot during the process, and the person makes his or her way to this country.

Should that be considered a political offense?

Mr. MCGOVERN. I think one needs to take into consideration a large number of factors, which you have alluded to in stating your hypothetical, one being the nature of the country involved.

I think that one of the primary considerations must be whether there is access in that country to channels of legitimate dissent;

whether there is free speech, the opportunity to work peacefully for political change. For example, insofar as there is no access to political mechanisms to achieve a group's political goals; insofar as a person who seeks peacefully to work for political change finds himself without cause imprisoned; insofar as a person who is so imprisoned has no opportunity to defend himself in a legal proceeding; or insofar as the legal proceeding is motivated not by legitimate criminal concerns but by political motivation; one may conclude that a person has been driven by extraordinary circumstances to commit a criminal act and that a political offense claim should be upheld.

To respond to your initial question, does the test that is established by the bill that is being considered today permit one to consider the factors that should be considered in determining whether or not the political offense exception should apply, I think the answer is "yes."

I hope I have been responsive.

Mr. HUGHES. It was a long way around the Maypole, but if I understand what you have said, working on the assumption that in that country there is no way to appeal, that obviously they are involved in a political movement, trying to express not just their sentiments, but other political sentiments within the community, given all those circumstances, where the structure of the country doesn't permit that type of free expression, that there is sufficient flexibility in the statute to consider that a political offense?

Mr. McGOVERN. I think there is sufficient flexibility. For example——

Mr. HUGHES. Let me take it one step further. Suppose the individual that is shot in attempting to escape really happens to be an innocent bystander?

Mr. McGOVERN. You are hypothesizing a jail break where an innocent bystander is shot?

Mr. HUGHES. Yes.

Mr. McGOVERN. Not intentionally shot?

Mr. HUGHES. Just shot.

Mr. McGOVERN. The person who tries to break out of jail——

Mr. HUGHES. In the effort to escape, the individual who is jailed mistook the individual who happened to be there to be one of the jailers and it turned out it was just a civilian there visiting one of the prisoners.

Mr. McGOVERN. I think the only thing that I can say that is responsive and responsible with regard to that question is that the identity of the victim is a factor that can be taken into consideration under the balancing test established by this bill. Whether or not the crime was intentionally directed toward that victim is another factor that can be taken into consideration, but I am loath to answer categorically with regard to hypotheticals.

Mr. HUGHES. I am not going to pursue it because it really presents a very difficult set of circumstances. My only point is, are we really crafting a statute that is flexible enough to deal with those individual situations? That is the point of it all.

When you start making exceptions, you are never able to anticipate all the circumstances that could develop. Is the statute that is drawn broad enough to deal with those particular situations?



Mr. McGOVERN. My answer to that, Congressman, is that I think that it is a very good effort to deal with the range of possibilities. Is it fully satisfactory? I don't think it probably is, but as I have tried over the past year and a half to come up with something better, I have not been able to do it.

Mr. HUGHES. Is there any conduct that you believe should be added to or taken out of section 3194(e) (2) and (3)?

Mr. McGOVERN. As I indicated in my prepared testimony, I suggested that rape should be listed as an offense which under no circumstances could be considered a political offense.

Mr. HUGHES. I would agree with that. Any others that you can think of?

Mr. McGOVERN. None come to mind at the moment.

Mr. HUGHES. Under the current Federal law the courts appear to be precluded under the rule of noninquiry from looking into the fairness of the trial or the treatment afforded the person or persons upon return, or the motivation of the requesting country. This rule means that the courts have no role to play in determining whether the legal procedures to be used against a person being sought conform to our sense of procedural fair play and justice.

Should a bill to reform the extradition laws allow for the courts to inquire into these issues? Is there any precedent for this approach in American case law or international law?

Mr. McGOVERN. I recognize, Congressman, that you found it unsatisfactory when I directed you to the written responses that we prepared for these questions following the hearings a year ago. The short answer is that I do not believe that the rule of noninquiry should be changed. The long answer appears on page 173 of the report of the hearings on H.R. 5227.

Mr. HUGHES. How about precedent for dealing with that? Some countries do permit that type of inquiry, do they not?

Mr. McGOVERN. It is my understanding that there may be some countries that do.

Mr. HUGHES. In those treaties that we have with countries where they permit that type of inquiry, is there reciprocity granted to this country?

Mr. McGOVERN. It would not be a necessary consequence, as I would understand it, that just because their country—

Mr. HUGHES. But do you know for a fact?

Mr. McGOVERN. I can think of no principled reason why the fact that country A permitted its courts to consider this question should mean that our courts should consider the question.

Mr. HUGHES. Haven't there been some cases that would suggest the court would look at, again, special circumstances, where there was just a suggestion in the case that the court found repulsive, that they would look beyond just the matters that the court was charged with determining, such as whether the defendant is the individual charged with the offenses and whether there is an offense in this country equivalent to an offense in that country?

Aside from the basic line of inquiry for a court, haven't some courts suggested in this country that there are those circumstances where they would look beyond that to see whether or not procedural due process and justice would be accorded to individuals?



Mr. MCGOVERN. Yes, Congressman. As we indicated in our written response to this question, the court in *Gallina v. Fraser*, 278 F. 2d. 77 (Second Circuit 1960) confessed to some disquiet concerning the implications of the rule of noninquiry and stated, "We can imagine situations where the relator, upon extradition, would be subject to procedures or punishment so antipathetic to a Federal court's sense of decency as to require re-examination of the principle." Repeating and endorsing this qualification, the court in *U.S. v. Gingle*, 507 F. 2d. 925, at page 928, stated that the inability to assert a defense might be one such situation.

It appears to boil down to a shocking to the conscience test. I am not in my own personal research aware, however, of a case in which the U.S. court has found that the circumstances before it fell under such a shocking to the conscience test. They indicated that there might be such a case, but I don't know that one has been adjudicated.

Mr. OLSEN. It would almost appear, Mr. Chairman, that to permit the court to look into those matters would really be giving the court the veto power over whether or not they like the prospective result that would occur should the person be extradited.

In many of my dealings with foreign government officials they are shocked, their conscience is shocked by the exclusionary rule in the United States. They operate on a very different system that does not have problems like that.

It has impressed me with the view that what appears to be appropriate here may not be someplace else, and vice versa, but that as long as overall we have integrity and respect for each other's institutions, that we should accord each other the differences.

Mr. HUGHES. I have always been of the opinion that one of the factors that our Government has to take into consideration before we enter into an extradition treaty with another country is whether or not basic due process will be accorded Americans.

Mr. MCGOVERN. That is correct.

Mr. HUGHES. That is part and parcel of the responsibility of the executive in advancing treaties, and the Senate in consenting to treaties that would permit that type of traffic.

My question then would be whether or not that isn't the response to the question of why we do not permit courts to look beyond what in effect is negotiations between two countries. If in fact the circumstances change in a given country and we have basic problems with their procedural safeguards, then it is time to reexamine the treaty between our country and that country.

Mr. MCGOVERN. You are quite right, Congressman, that that is one of the sound reasons why the rule of noninquiry, which is, after all, a judicially created rule of deference to the Executive, should be maintained.

Mr. HUGHES. I have no further questions. I really appreciate your testimony. You have been most helpful. I am going to recess the hearing. I have about 4 minutes to get to the floor. We will take our last witness, Mr. Halperin, when we get back.

Mr. HUGHES. The subcommittee will come to order.

Our final witness is Mr. Morton Halperin, who is director of the Center for National Security Studies, which is jointly sponsored by the Fund for Peace and the ACLU Foundation.

Mr. Halperin is an adjunct professor of political science at Columbia University. He received his B.A. from Columbia College in 1958 and his Ph. D. from Yale University in 1961. He has had a most distinguished career, both in and out of the Federal Government.

Mr. Halperin, we are just delighted to have you. I am sorry for the enormous delays, but we can expect more of the same with this particular bill on the floor. You may proceed as you see fit. We have your testimony, which without objection will be made a part of the record. I hope that you can summarize it.

#### TESTIMONY OF MORTON HALPERIN, DIRECTOR, CENTER FOR NATIONAL SECURITY STUDIES

Mr. HALPERIN. Mr. Chairman, let me say first that I appreciate the opportunity to be heard today. I am testifying on behalf of the American Civil Liberties Union.

I would like to say first about the statements in the testimony on the issue of bail and of detention, that they are evidently based on a misreading of the statute. Conversations that I have been able to have in these recesses with representatives of the Government suggest that either I have misread the statute or perhaps it hasn't been crafted as is intended.

The issue turns on the question of whether the Federal Rules of Criminal Procedure apply to the magistrate's decision to issue a warrant. I read the statute as not requiring that. I am told that the intention is that it does require that.

If that is the case, then the statements that we make in our testimony about detention are incorrect, and I would like to ask permission to revise the statement before it appears in the record, to take account of that misunderstanding.

Mr. HUGHES. Without objection, you will be afforded that opportunity.

Mr. HALPERIN. Therefore, I would like to make three points very briefly.

First, let me say one word on the bail issue, since I started with that. The problem we have with the special circumstances is that as I read that in the cases, and particularly the Supreme Court decision where it was created, what it says is even if there is no risk of flight, even if you are grounded in the community, even if there is no likelihood that you will commit a violent act, you still need an additional element—you are sick, you have a sick relative, some other kind of special circumstance—before you are granted bail.

In conversations that we had in the breaks, my understanding is that the courts don't follow that, that in fact if you are an American citizen in the community they are going to grant you bail even if there is not a special circumstance.

I think it would be unfortunate for Congress to codify a standard issued in a 1901 Supreme Court decision that is not the law. The danger always is if you put it into law now, the courts will decide

that you meant something by it, that you meant them to apply the standard that was stated in 1901 and that was not subsequently applied.

I would urge that however you come out on the burdens, that you ought to specify the standards and not simply enact this arcane and archaic special circumstances provision that is in the administration's bill.

I really want to focus my remarks first on the political offense exception and then on the rule of noninquiry.

On political offense, I don't understand that any of us have any difference in what we want to accomplish. We all agree that the terrorist who throws a bomb in the marketplace should be extradited, even if the terrorist says he did it for a political purpose.

I don't hear anybody saying that a revolutionary who is trying to overthrow a government should not be accorded the traditional political offense exception to extradition. The problem is how to draft that.

I think part of that goes to your observation that we shouldn't have extradition treaties with countries that do not accord due process to their citizens. The problem is who decides that.

Even if an executive branch comes in that has a different view of whether there is due process in country X, Y or Z, you just don't wipe all the extradition treaties off the books in one day. So, I think at any time we are going to find ourselves in situations where we do have extradition treaties with governments that many of us do not feel accord due process.

Of course, we heard Senator Dodd and President Reagan last night express very different views about whether or not there is due process in El Salvador. I think there always will be those kinds of disagreements. Therefore, I think it is important to draft the language in ways to get terrorists that throw bombs but doesn't open it up to the danger of abuse so that a government will simply accuse all of its political opponents of being in a conspiracy and one act of the conspiracy was one bomb thrown in a marketplace. Then everybody in political opposition to that country can be extradited.

We have suggested some language that is in our testimony. We would be delighted to work with you and your staff and the executive branch to see whether that forms the basis for an agreement. I don't understand there to be any difference on the substance of the issue.

On the rule of noninquiry, I was very interested to hear the Government witnesses today suggest that in deciding the exceptional circumstances to the political offense doctrine, a court could inquire into the political situation in a country to decide whether the judicial system works, whether there is a free press, whether there is a right of assembly and so on.

I think it is important that your report reflect that the government believes that the courts can and should inquire into that. That is exactly the same kind of inquiry that we think the courts should engage in under the rule of inquiry rather than the rule of noninquiry.

If the court has the expertise and the ability to inquire into it in determining whether there are exceptional circumstances, I don't

understand why they can't use the same expertise in deciding whether or not a person's extradition is being sought for political reasons and will result in an unfair trial. It is the same exact inquiry. Is the judicial system functioning and so on.

Second, under current law, as you know, if you apply for political asylum, a court ultimately decides whether you have a well-founded fear of persecution or not. The full Judiciary Committee in the House has affirmed that in considering the immigration bill last year.

That is exactly the same issue as the inquiry. We would have a situation, if you excluded inquiry by the courts, that if you came in and applied for asylum, the court would decide whether you had a well-founded fear of persecution.

But if you were asked to be extradited and you said they really want me back because they object to my political views, they are not going to try me for this crime that they allege I committed, they are just going to throw me in jail and leave me there because they don't like my political views, then some other court doesn't have the expertise to decide whether that is true.

That just can't be right because it is exactly the same question: Do you have a well-founded belief that what the Government intends to do when it gets you back is throw you in prison and throw the key away because it doesn't like your politics?

I just don't understand how one could conclude that the courts don't have the expertise to do that. Again, precisely because we think we may have extradition treaties with countries that there is at least a disagreement about whether they observe due process, the courts ought to be the final arbitrator.

I think that is especially true because as we have seen, for example, in the case of whether the Chinese tennis players should be given political asylum or not, the State Department is influenced by the desire to have good relations with its allies and with foreign countries. It was clear that the Department weighed that issue of how the Chinese would react if we granted asylum in deciding whether to grant asylum or not. Of course, it ultimately in that case did, though in many other cases Chinese and others are denied political asylum when they request it.

We think that those decisions ultimately should be made by the court, which is not influenced by whether we have good relations with the country or not, and that protects the State Department because it can say, "We went ahead with the extradition request and the court overruled us. It decided there was not sufficient evidence of due process and we have told you, you have to clean that act up," as the Secretary of State has been telling the Salvadorans.

We think it is in everybody's interest, and certainly in the interest of protecting of the individual, that the courts make that inquiry and be allowed to make that inquiry.

The fact of the matter is that when you try to get judges to second-guess the executive branch on issues of national security—and we spend a lot of time trying to do that and almost always unsuccessfully—that the courts will defer to the executive branch. If the Secretary of State says there is due process in that country, it is going to take an enormous amount to persuade a judge to second-guess that.



So, we think that in most cases the courts won't do it, that they will only inquire when, as the Government witnesses said, it shocks the conscience. We think that the possibility of raising that issue and of succeeding, which you would only be able to do in extraordinary circumstances, should not be precluded by the legislation.

I am going to stop there. Of course, I would be delighted to respond to your questions. We look forward to working with you in trying to see if we can get a bill that we could all support.

[The statement of Mr. Halperin follows:]

#### PREPARED STATEMENT OF MORTON H. HALPERIN

Mr. Chairman, I appreciate this opportunity to testify upon behalf of the American Civil Liberties Union on H.R. 2643 the "Extradition Act of 1983." The American Civil Liberties Union is a nonpartisan organization of over 250,000 members dedicated to defending the Bill of Rights.

The ACLU supports reform of the extradition laws of the United States. Indeed we believe that there is an urgent need to modernize these laws to take account of conditions in the world today and to conform the laws to our current understandings of the protections afforded by the Bill of Rights. In order to put before the Congress a clear statement of the provisions we believe should be included in a constitutional and appropriate extradition bill we are in the process of preparing an alternative bill. Because we were not able to complete the process of drafting the bill and an explanation of its content in time for this hearing, I would request permission to be able to submit the proposed text and explanation as an attachment to this statement which would be printed in the record as if submitted with this statement.

Today I would like to present to the subcommittee the ACLU's views on the basic issues raised by the legislation. I will do so, if I may, Mr. Chairman, by commenting briefly on several key issues, viz. the political offense exception, the rule of non-inquiry, administrative detention and bail, and the standards and procedures of administrative review. We have some other problems with H.R. 2643 and these will be corrected in our alternative proposal.

#### POLITICAL OFFENSE

We join the consensus which holds that the political offense exception needs to be re-defined in light of modern conditions and that this should be done by stating what is, except in extraordinary circumstances, not a political offense rather than trying to define what a political offense is. We thus have no difficulty accepting sec. 3194(e)(2).

Our difficulty arises with the sweeping terms of sec. 3194(e)(3). We share the basic thrust of the section as we understand its intent but we believe that it goes too far and that in seeking to solve one problem it creates another.

We believe that any successful attempt to cope with the problem of defining what is not a political offense must take account of two phenomena of the current period. The first, on which the bill focuses, is the modern terrorist who strikes at unarmed civilian populations often in democratic societies and often with the hope of provoking unpopular methods of repression. We support efforts to rewrite the law of extradition so that individuals who engage in terrorist acts directed at unarmed civilian populations should not be able to flee to the United States and be safe from extradition.

However a well created bill must deal as well with the fact that the United States now finds itself allied with repressive governments who seek to suppress peaceful political dissent by branding it "terrorism." Without entering into the debate about the wisdom of American alliance with such countries as the Philippines, Chile, Taiwan, or South Africa, we note that many impartial human rights groups have accused the governments of those states of engaging in patterns of gross violations of human rights.

Political opponents of such regimes who seek refuge in the United States must not be subject to extradition by regimes who will not hesitate to accuse their political opponents of engaging in conspiracies to commit violent acts. One way to deal with this problem is to authorize the courts to inquire into the real objectives of the state seeking extradition and, as indicated below, we believe that to be essential. However, whether or not there is a rule of non-inquiry, we believe that the political offense exception language must be drafted so as to insure that political opponents of repressive regimes do not fall within the ambit of those who can be extradited.

We therefore urge the committee to consider language along the following lines: "an offense that consists of intentional, direct participation in a wanton or indiscriminate act of violence with the purpose of causing death or serious bodily injury to persons not taking part in armed hostilities." We would not permit extradition for alleged conspiracies because they are too easy to charge and we are not prepared to run the risk that all the political opponents of a regime will be charged with being in a grand conspiracy which includes one terrorist act. We believe that it is sufficient to carve out an exception for those directly involved in terrorist acts. It is worth noting that the three recent cases of extradition which have attracted attention involved charges of direct involvement in terrorist acts.

#### NONINQUIRY

We are very strongly opposed to the attempt in the bill to explicitly deprive the courts of the authority to inquire into the motive of the state seeking extradition in order to insure that the extradition is not for the purpose of persecuting the individual because of political or religious beliefs and to be sure that the individual will be accorded due process.

In fact we believe that the legislation should specifically authorize a court to inquire whenever the person to be extradited alleges that he or she will be persecuted for political beliefs or other impermissible reasons or that he or she will not be accorded due process.

While courts have seldom undertaken such inquiry we believe that, at least since the United States became a signatory to the 1967 Refugee Protocol, the courts have been obliged to "deny extradition in cases in which it is demonstrated that a fugitive's life or freedom would be threatened on account of his political opinion," (*Nicosia v. Wall*, 442 F.2d 1005 (1971)), and that they have always have been free to do so.

Since courts now routinely make the very same determination in considering requests for political asylum we fail to understand why they cannot do so in extradition cases. To say that a Court of Appeals panel can on one day make the judgment that an individual should be granted asylum because if returned home he would be subject to political persecution but that the court lacks the expertise to make the same judgment two days later when the same state seeks his extradition is, to put it mildly, absurd. Moreover the policy reasons which led the full House Judiciary Committee to insist on maintaining full judicial review of asylum requests apply as well to requiring inquiry in extradition cases. We simply cannot trust the State Department not to permit concerns about its relations with a foreign country to color its analysis of both asylum claims and extradition requests. Indeed it is the job of the State Department to promote good relations with foreign nations; it is the duty of the courts to insure that the law is faithfully followed and that all persons within our borders are accorded due process and equal un-biased justice.

There is nothing to suggest that courts will find improper motives where they do not exist. In fact our experience with assigning such questions to the courts suggests that, if anything, they will defer more than they should to Executive Branch expertise. However, under the U.N. protocol, the United States is obliged not to return a refugee to a country "where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." That obligation accords with the traditions of our nation. We should have no fear of according an alien the right to prove to a court that extradition would violate that commitment.

#### ADMINISTRATIVE DETENTION AND BAIL

Mr. Chairman, we are greatly reassured that our original concern regarding the standard for the issuance of a warrant was groundless and that the bill does require probable cause prior to the issuance of a warrant.

However, we do oppose the provision in H.R. 6046 that sets up special standards for granting bail in extradition cases and places the burden on the arrested person to prove that he or she meets the standards, at least in the initial phase of detention. Our position is simple. We believe that a person detained pending extradition must be eligible for bail on the same standards as one charged with an offense in the United States.

#### ADMINISTRATIVE REVIEW

Our understanding is that the Department of State now routinely offers a person to be extradited the opportunity to make a written presentation to the Department and that, in such cases, the Department releases a statement explaining its reasons

for proceeding with the extradition. We also understand that the Department routinely conditions extradition on the person being tried only for the crime for which he was extradited and requires that he be accorded due process of law. We cannot understand why there would be any objection to writing these restrictions into law.

Mr. Chairman, that completes our prepared statement. I would be glad to answer any questions that you and other members of the sub-committee may have. We would also welcome an opportunity to work with you to start to seek to find ways to improve the bill so as to meet our common objectives.

Mr. HUGHES. Thank you, Mr. Halperin, for an excellent statement.

Let me just ask you, following up on the court's ability to find in extraordinary circumstances that in fact the act that was committed would fit within the political offense exception, even though it was an act of violence:

What role would you say the State Department would have under those circumstances, if at all, in a proceeding where the court makes that type of an inquiry? Would you give the Secretary of State any role at all?

Mr. HALPERIN. In inquiring as to whether they would get due process and whether they would be tried for the offense that they were—

Mr. HUGHES. The question of just exactly the political makeup of the country, the type of political justice system that exists in that country, that country's record on human rights, the whole litany of these kinds of issues.

Mr. HALPERIN. I would think that the court certainly should hear the position of the Government on that and will take it into account in the decision. Certainly the Government should be free to bring forward any evidence that it has to rebut the assertion that this is the case.

Of course, under most treaties the Secretary is going to have to make that judgment before he ultimately extradites the person anyway. Presumably, the Department has thought about it and should be in a position to share that information with the court.

Mr. HUGHES. Do you believe that the Secretary of State does have a legitimate role to play in the final analysis before extradition is granted?

Mr. HALPERIN. Sure, yes, absolutely. I think he must exercise it. That is essentially political discretion.

Mr. HUGHES. Short of that role, you would relegate the Secretary of State to just the role of being a witness in the context of the hearing?

Mr. HALPERIN. Well, it is more than a witness because under this bill the Government is, of course, requesting the extradition on behalf of the foreign government. What we would have is a situation where if the person being extradited raised this claim, the Government would then be in a position to bring forward evidence and testimony about why it does not believe that these claims are accurate or not, and that ultimately, as in the case of political asylum, the court should make the final determination that these claims have no merit.

Mr. HUGHES. On the bail issue, the bill attempts to balance the interests of our Government. In trying to respond to legitimate requests of other governments, we are attempting to honor the treaty obligations that we have, and yet balance the interests of the indi-



vidual. The compromise that was struck in our bill was the 10-day rule, that you heard probably more than you wanted to hear about today.

You have some difficulty with putting the burden on the defendant during that 10-day period. Isn't the defendant really in the best position to be able to demonstrate in most instances his or her connection to the community, family commitments, reasons for not fleeing the jurisdiction? Isn't that peculiarly within the knowledge of the defendant?

Mr. HALPERIN. I think that I need to answer that in two ways. One is to say that I agree with what was said on several of these other issues; that I think a lot of this is very metaphysical; that whatever burdens you set out the judge is going to decide whether the person is going to flee or not, and he or she is going to make the determination based on his or her sense of whether the person will flee, whatever you say about preponderance and burdens in that situation.

I have taken to interviewing judges when I run across them about who has the burden, and I find that they don't think about that. What they think about are the factual questions that they have to answer.

Nevertheless, we think as a matter of constitutional right—and we are dealing here both with Americans and other persons protected by the Bill of Rights—that the burden is on the Government as a formal legal matter to prove that the person will flee and, therefore, should not be granted bail.

Obviously when the Government makes a *prima facie* case of saying, "Look, they fled from this other country and so on," the court is going to turn to the person and say, "How do you respond to that?"

So, as a practical matter the differences in what actually happens in a court is small; we have been told that despite the special circumstances the judges let people out without special circumstances. We think as a constitutional matter that the burden has to rest on the Government.

I don't think there would be any problem in the report in noting the fact that unlike a domestic crime the Government's ability to bring forward particular kinds of evidence may be different than it is when it is in the United States and it is trying the case.

We think as a constitutional matter the burden should remain on the Government throughout the process. Of course, I think I should say for the record that we think that taking account of potential harm to the community is not constitutionally permitted.

Mr. HUGHES. Mr. Halperin, can you think of any situation where rape should be included in the political offense exception?

Mr. HALPERIN. No; I can't imagine any circumstance in which rape would be a political offense whether or not you had an exception. I would leave it out completely. You are listing crimes where people may allege a political motive, but I certainly don't object to moving it if there is any reason to.

Mr. HUGHES. Is there any conduct that you believe should be added to or taken out of the first and second sections of the bill?



Mr. HALPERIN. Can you point to me the page in the bill, if you have it there, because we do have one problem with that. We have a problem with (d).

Mr. HUGHES. Multilateral treaties?

Mr. HALPERIN. Our position is that the specific treaties are named that this procedure is appropriate for, and there may be future treaties that the United States signs for which it would also become appropriate to include them in that first category.

But to have an open ended situation where the words literally are the United States could get together with two very tiny countries and sign a treaty which would then be "a multilateral treaty," which would commit us on any particular offense, either to extradite or prosecute, and then it would be covered by that provision.

We think that only should apply to the kinds of crimes which are specified in (a) through (c). If there are any other such treaties now, somebody should come forward with them and they should be added.

If we are talking about future treaties, the appropriate way to do that is simply to amend the statute in the process of passing the implementing legislation on the treaty to include that. The House of Representatives should not give a blank check to the Senate and the President to get additional crimes in that category where it can never be a political offense, simply by signing the same treaty simultaneously with two countries.

We would urge you to exclude (d) from the list. Of course, our revised paragraph substitute for your (a) and (b), the substitute that we have—and I should make that clear, it may not be clear in our statement—would be a substitute for (a) and (b) on the top of page 13.

We would not for that offense, for the terrorist offense, include conspiracy because what we are concerned about is the situation that I have described, where there is a general attempt to overthrow a government where there is one terrorist act by somebody opposed to the government and that government then accuses all of its political opponents of being in a conspiracy which includes one terrorist act.

We think the terrorism exception should apply to the terrorist. As we understand the cases that have raised this concern, the IRA cases and the Palestinian and so on, these were people who were actually accused of throwing the bombs or being in the cars. We think those people should be covered, but we don't think the net should be so broad.

Mr. HUGHES. You don't think that the people who consorted to throw the bombs should be included?

Mr. HALPERIN. I do think if you could find a way to limit it to them, but you always have the problem of where you draw the line. The question is how much you want to protect.

Mr. HUGHES. Wouldn't that be taken into account by the court in determining whether or not—

Mr. HALPERIN. As I understand the circumstances, the court would have to take account of the circumstance of the one terrorist act and the question of how remote the individual was from that

one terrorist act of an overall effort to overthrow a government, some political some nonpolitical.

Mr. HUGHES. I was under the impression that in the report language we touched upon just that issue, just how remote it is. My recollection is we that we did deal with it, how remote the act was to the primary actor's offense.

Mr. HALPERIN. The problem is, again, how effective the report language is but also in terms of our conspiracy law, they would be involved in the conspiracy.

There is, as you know, a body of law that deals in the United States with conspiracies which are partly legal and partly illegal. It came out of the *Spock* decision, in which the court in effect applied a different standard to participants in the conspiracy who are only engaged in legal acts themselves, even though there may have been a larger conspiracy of illegal acts.

That is the thought we want to get at. There may be other ways to do it, that if there is political opposition in the country, the Government should not be able to drag everybody in. On the other hand, if what you are saying is the person helped plan the terrorist act and they were the ones who designed the escape route and so on, then we agree they should be covered. The problem is how to draft it to draw that line.

Mr. HUGHES. I think what you have said in essence is that there doesn't seem to be much disagreement on most of the major issues. The only question is whether or not we have really drawn a bill that would insure that some of the concerns are addressed.

Mr. HALPERIN. I think that is right. I think that some intensive discussions among the people concerned about this could produce a bill that would have if not all the differences removed, at least narrowed. We would welcome an opportunity to do that.

Mr. HUGHES. I think you will agree, and I think you have, that the reform of the extradition laws is long overdue, and that the fact that we are insuring that counsel is provided and that only the Attorney General can file the complaint, and providing the right to appeal, and setting forth the structure that would give some semblance of order to the procedure are all advancements.

Mr. HALPERIN. I agree. In the interest of time I didn't read the opening paragraphs of my statement, but we want to commend you for that effort. We agree that it is time to modernize and reform the extradition laws. We have no quarrel. Indeed, we think it is important to go forward with this exercise.

We think it is important, as your question suggested to the Government, that we not sweep too far in eliminating the right, which we think does exist now. We do cite one case in which the court of appeals sent a case back on the issue of inquiry, *Nicosia v. Wall*, which is cited in our testimony. We think that international law requires the court to make that inquiry, and so did the court of appeals in that case.

We don't want to get rid of that, we want to preserve that, and we want to define a political offense in a way that doesn't raise the dangers that we suggest, but we think that there should be reform in this area and we commend you for moving forward.

Mr. HUGHES. Thank you. Your testimony has been most helpful. We look forward to working with you.

Mr. HALPERIN. Thank you.

Mr. HUGHES. That concludes the hearings for today.

[Whereupon, at 4:25 p.m. the subcommittee was adjourned.]



# REFORM OF THE EXTRADITION LAWS OF THE UNITED STATES

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THURSDAY, MAY 5, 1983

HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON CRIME  
OF THE COMMITTEE ON THE JUDICIARY,  
*Washington, D.C.*

The subcommittee met at 2:25 p.m., in room B-352, Rayburn House Office Building, Hon. William J. Hughes (chairman of the subcommittee) presiding.

Present: Representatives Hughes and Sawyer.

Staff present: Hayden Gregory, counsel; Virginia Sloan, assistant counsel; and Charlene Vanlier, associate counsel.

Mr. HUGHES. The Subcommittee on Crime will come to order.

First, let me apologize for the delay. I understand my staff has indicated the problem we have had, and that is that the full Judiciary Committee has been marking up our major comprehensive immigration bill and it ran over. And as you may expect, we're not permitted to meet while the full committee is in session nor would it have been advisable, considering the nature of the legislation before the committee. So, I just hope you understand, and we apologize for any inconvenience today.

Today is the second day of the Subcommittee on Crime's hearings on H.R. 2643, "The Extradition Act of 1983." The purpose of H.R. 2643 is to modernize the extradition laws of this country, which are universally conceded to be antiquated and inadequate to deal with modern political and legal systems. While filling in major gaps in the substance of the current law, the bill attempts to maintain the structure of the current law.

Last week, the subcommittee took testimony from the Departments of State and Justice, and from the American Civil Liberties Union. All of these witnesses made helpful suggestions about the state of our extradition laws, and about how the legislation should modify those laws.

Today, I am certain we will hear equally valuable testimony. The witnesses before us today are uniquely qualified to discuss the extradition laws from a practical and legal standpoint. We will hear from a Federal magistrate; from a law professor who has written extensively on extradition; from another lawyer who has evaluated the extradition laws for the American Bar Association; and from the director of the political asylum project for the Lawyers Committee for International Human Rights.



Our first witness is Magistrate Peter Palermo of the southern district of Florida.

Magistrate Palermo is the chief of the magistrates' division for the southern district of Florida. He was one of the first Federal magistrates appointed in this country, and has been the chief magistrate for the last 4 years.

Before being appointed to the bench, Magistrate Palermo spent some 20 years in private practice in his own firm in Miami, and was a prosecutor for the State of Florida.

He is a graduate of the University of Miami Law School.

Magistrate Palermo, we're just delighted to have you with us today. Welcome.

#### TESTIMONY OF HON. PETER PALERMO, MAGISTRATE, SOUTHERN DISTRICT OF FLORIDA

Magistrate PALERMO. Congressman, I appreciate the opportunity of being here. I had rather short notice and had a difficult time getting here; but I am here.

Mr. HUGHES. Well, we're just delighted that you're here.

Magistrate PALERMO. I would like to just make some comments from the practical end of it rather than the theoretical end of it.

Mr. HUGHES. That is what we want.

Magistrate PALERMO. I've gone over the last bill that I happened to have in H.R. 2643. Your statement I find to be practical and excellent in endeavoring to—my thinking as well, for the bill, for whatever it is worth.

I, personally, have had many extraditions and have let several out on bond. I haven't had any problem with the bondable part, as it is now, with special exceptions. And I don't know of anybody that I know in the United States that is letting more out on bond than I have and have had no trouble fitting it within the special exceptions.

Mr. Abbell and I were talking, and we recalled one we had where both were American, natural-born citizens, and wanted to be extradited to one of the islands, and two brothers. And the mother and the father were in court and had a business, and without one of the boys there, the business was going under. The father was an invalid. We fitted it into special exceptions, but we also only let one brother out at a time to help mother and father under those exceptions.

And it worked out fine. And I have had no problem with that.

I have not had any problem with the political exception since the fifth circuit in Escobedo defined it clearly and in wording that they have recited there as to the political offense under extradition as defined "as an offense committed in the course of and incidental to a violent political disturbance, such as a war, revolution, or rebellion", and clearly stated that political motive, in itself, is not sufficient. So that, to me, gave the courts a fairly good guideline to go by.

And, of course, the next question is: What is a revolution and what is a rebellion? And the Bay of Pigs probably could have been considered a rebellion. In my opinion the PLO matter would not be

that type of thing. But that is something that is going to have to fit a factual basis rather than trying to define it.

With the bill as you have it, though, I think that the recommendations in there for keeping the Government and the demanding nations' feet to the fire to proceed as expeditiously as possible under the treaty, to have the matters taken care of, is wonderful, and it is great, and is something that was needed, after a man has been declared extraditable, and give them so many days to do it or else. And it's more than fair, and still it would come under the treaty. And that type, I think, is great.

I know your other big problem is the review. I find no fault with review, provided you're not giving two bites at the apple. In all fairness I think you should have fair hearings and so forth, but if they're going to have two bites at the apple—

Having been a defense attorney for many years, I look at everything that I read, including search warrants, from the defense angle first. And I looked at this bill from this angle. And I can see that if you give them direct review, then you're going to go on for at least 6 months to a year, and then they're going to come back with habeas corpus. If you do restrict—and I understand you are trying to restrict—habeas corpus, too, when they come back and can do that, that might solve that problem. But it is one that I am sure you are aware of. But as the practical end, it should be proceeded very cautiously; otherwise, we're just cluttering up the courts more. The courts don't need it.

On the other hand, I realize that, as I say, football is rugby, football is the National Football League, football is Canadian football, but there surely are different ball games altogether; and extradition is that way. And it is difficult for the sitting judge to put his hat on and forget a great deal that they learned in law school and apply the treaty and the laws as you've set forth. And unless we do that, we can't do the job under that particular statute.

I think the appointment-of-counsel features are excellent and much needed. As you say, there is not any quibbling about that.

The bond question, as I said, is a difficulty. You have difficulty—some people have difficulty. First, we've got to decide if we're bonding them; and that is the difficulty here, not the conditions. Once they're decided to be bondable, the conditions are easy; as set forth here, they are excellent. Because they are the ones that we would consider, anyhow.

You may broaden the scope of the exceptional circumstances. I would definitely be against having them come under the Bond Reform Act. I think it is a different ball game.

I think that you had a great deal of trouble in the prisoner exchange programs when it was first adopted. From talking with other countries' officials, I can see where we would have a great deal of problems if, you know, one just said to the effect, "I'll just take my football and go home if you don't do what the treaty says." I can see problems there if we apply that.

On the other hand, as I said, I haven't had any problems fitting it under the exceptions, the special exceptions we now have in existence. I know of, as I say, several that would fit there. And it was upheld, where it did go to the appellate court and it is being

upheld, I can think of three or four just offhand where I did permit them out on bond.

The reviews—I would like to say I would like for the courts to review the State Department, but I don't think it fits in extradition. There has to be that division. I think you discussed that in here, and certainly, I know, considered it with more authority than I have. But it has to be handled very delicately, and to a degree, the extradition judge is more or less of a hearing examiner for the State Department, as the old rule set up, except for the bond matters and that type of thing. On the other hand, you do have some judicial review there, out in the open; someone is looking over their shoulder and checking.

And I think the intent of both the Senate bill and your House bill is basically excellent, with the thoughts that I have. I wanted to give you my thoughts today as the practical end of it, and let you ask some questions. And then I can—if you have any—certainly, rather than go over each—

There is one other thing. I understand it is your intention that the magistrate continue being authorized, where authorized, to have these hearings. It's not in the bill; however, it's been explained to me why. If you put it in here, you might have to put it everywhere; so, I've had that question answered already. I thought there was a good reason. I asked, and somebody else gave it to me.

I know, in our district, our district judges certainly don't need or want to be hearing these now. If they want, they always can, of course; you know, "Good morning, Lord."

But we just don't have the time now, as you know. That's one reason I haven't had the time to prepare as I would like to on this. However, we have the visiting judges, and we have to have everything ready for them, and so on.

Mr. HUGHES. Well, we're delighted that you took time from your busy schedule to come in and share with us some practical insights.

Magistrate PALERMO. I'm not that important, I am just busy.

Mr. HUGHES. Well, I don't know.

Magistrate PALERMO. If you have any questions from the practical end of anything on anything I've said, I'll be happy to answer them.

Mr. HUGHES. I gather, overall, that you feel that we have maintained a proper balance between the decisionmaking on the part of the Department of State, which involves other nations and the political problems that have to be dealt with, and, on the other hand, the problems that an individual would have—the civil liberties issue. Do you think that the procedure that we set forth is a fair and workable one?

Magistrate PALERMO. It is up to the judge, you know. If the judge has some backbone and some knowledge, as I think it's the old story, it's as good as the judge.

Mr. HUGHES. And that is always the case.

Let me ask you just a couple of other brief questions.

In applying the special circumstances test, have you had any particular problems with that?

Magistrate PALERMO. I have not. And I think we have more extraditions than anybody in the United States in our district. And



I've let several out, and they fit the exceptions; and I think Judge Sorrentino has, I know Judge Kyle has.

And basically, we've not had any problem with it. As I say, the one I just recited; and then there's another one that fits the exception, Amari Safi, who is still, I think, out on bond. He was in jail 3 years and in the U.S. courts. And, amongst other things, the Justice Department didn't file a complaint against him until just before he was about to finish serving his prison term. And that fit the special exception, because it was obvious they were trying to hold him in jail longer and they should have proceeded while he was in jail. That was the second one.

Another one was where a man was dying, of course. It did take him 6 years to die, but he died. But I had Government doctors examine him every 3 months and they said that he was seriously ill and dying; and, certainly, that fit the exception—Judge Vardi, which went back and forth.

Mr. HUGHES. Escaped from prison?

Magistrate PALERMO. Yes.

Mr. HUGHES. Let me ask you. In the legislation, as you know, we put the burden on the individual to establish that he or she does not present a risk of flight or danger to the community in the first 10 days, on the premise that it takes a while for the requesting jurisdiction to get the information to the Justice Department, so 10 days would give it adequate time, and then, after 10 days, the Government would have the burden of going forward to establish that the person presented an unreasonable risk of flight or danger to the community.

Do you see any practical problems with that approach?

Magistrate PALERMO. Well, I don't, really—even though my friend, Mr. Abbell—

You have, also, in there that it can be extended by order of court; which is a protection, for the Government's being protected, too, if they come in and say, "We've had problems, there's problems down there, they had an earthquake," or whatever, "we can't get the communications."

Certainly, the judges can extend the time. I don't find the Government hurt by that, really.

Mr. HUGHES. Do you find the Government has adequate time, generally, within a 10-day period, to secure the necessary documentation?

Magistrate PALERMO. Generally not. But with the extension on there, I don't find any problem.

Mr. HUGHES. I see.

Magistrate PALERMO. The men in the Government, the State Department, move slowly, as you know. I guess the courts do, too. I don't know that 10 days, in itself, is enough; but I find that with the extension of time and application, could be.

What I like about the bill is you're keeping our Government and you're keeping the demanding nations' feet to the fire: "If you want this man, let's go ahead; if you don't want him, let's let him go." And this is the philosophy that I like that is in here. It is so much needed. And I personally appreciate from everybody justice and so on.

Mr. HUGHES. Thank you, sir.

The gentleman from Michigan?

Mr. SAWYER. Yes, sir.

Judge, do you think this bill would add appreciably to the burdens of the court workload?

Magistrate PALERMO. If we don't try to make it too specific and get too much in it, too many words, I think that it can help. If we get to where we are trying to define too well, looking at it again from the defense attorney, you're just giving me more to shoot at.

And I can see in here, although the intentions are fine, some few words here, and right away I'm saying, "Well, there's a loophole I might grab, here's where I can delay it a little further, or I can bring a suit, or what does this mean."

Between your bill and the Senate bill, I think that, in my humble opinion, is an excellently well worded bill that could come out of it. The intent is the same, basically. And I think that you're—again, in my humble opinion—on the right track, but I think you have to be very careful not to try to put too much in it or we're going to have problems, you know. And that is the problem from the judges' angle.

I can see how a sharp—we have some good lawyers, and I'd like to try, myself. And that's the only thing I miss from being on this side of the bench, is the actual trial cases. And the first thing I do is look at it, and I can see, looking at this, "Well, here's something; what do they mean by this?" And that's why I was going to ask the question about the magistrates having the authority, because the first thing we're going to get is attacking whether the magistrate can hear it or not.

And there are several things, but basically I like the bill. But with the two bills together, with the careful drawing up of the wording of it, I think that we will not have much problems with it.

Mr. SAWYER. I deduce you weren't totally happy with the appellate review provisions. How far do you feel those could be curtailed and still be fair to the defendant?

Magistrate PALERMO. Well, we're still being bound by the treaty. The treaty is the one that decides what the rules are that we go by in a particular extradition, and then you tell us, under that treaty, what the rules are. As long as they have one solid appeal under the laws that you pass—not under what we think, you see—this also worries me, that some judges can take some of this and run away with it and cause more problems. They can't quite get the neutral, detached, or the extradition hat on, as I call it, leave their district court or the Constitution Bill of Rights hat on the side and put your extradition hat on. That's our problem. If we're careful we won't have some runaway judges, and you also won't have your slick defense attorneys delaying it from 2 to 5 years.

The Vardi one, you know, he was just passing through from Miami to Canada and the attorneys knew about it and slapped him with a writ of habeas corpus at the airport, and he died here 8 years, 7 years, later, something like that, in the United States. And that is not exactly right either, but it was good legal maneuvering.

That is my answer to that, both the judges, if it is on the appeal, and the courts, it is just going to make an extra burden if you give them two shots at it, certainly they should have one, and that could be either habeas corpus or review.



Now, if you limit, as you tried here, on habeas corpus, to not present anything that had been already presented in the court, and that can stand, that is not bad, in my opinion.

Mr. HUGHES. Would the gentleman yield?

I think the gentleman's concern, mostly, is with the multiplicity of habeas corpus petitions which often are spurious. And both of us share your concern. If we had jurisdiction over habeas corpus, we might be legislating in the area.

Magistrate PALERMO. Well, I say that's it, just don't give them two cracks at the box when one will do. We don't need it, you know. We already have this—somebody has this down—now, 26 cases filed by one prisoner since 1980, and I'm having—it will take me months to decipher what has already been presented to the various courts in the State of Florida, in three districts in the State of Florida, and get down to giving him all the rights that he is entitled to. And it is burdensome, but in our great country we have it. We still take each one carefully and look for that needle in a haystack; but it is not easy, as you know.

And that was my concern with the review, if it would be possible to just not have a double review; if you can't limit habeas corpus, then I am not in favor of the direct review under the bill. If you can limit the habeas corpus, which is difficult, as you've already stated, Congressman, then we have some problems. In my opinion that's how we got into a lot of this immigration and naturalization difficulties; but please, you've already had enough of that.

Mr. HUGHES. Would the gentleman yield for just one second?

Mr. SAWYER. Yes.

Mr. HUGHES. As a practical matter do you find that extraditable defendants present any more risk of flight than the average run-of-the-mill defendants you have through your court?

Magistrate PALERMO. It's the same as any other one, each one is a different case and we apply the rules to that particular case. It would be the same thing. As I say, the ones that I found and were let out, we had no problem with. They made all of the appearances and so on. On the other hand, Justice informs me, and probably rightly so, the ones out on bond take longer to dispose of. But that doesn't say to put them in jail, and they finally say, "Look, I give up; give me back there if I'm going to be in jail anyhow."

Mr. HUGHES. They're out trying to earn their money to pay for the high-priced counsel they're employing.

Magistrate PALERMO. Yes. And that is important, you know. I even take that into account in setting bonds now, I know certain attorneys and how much they get, and that if an attorney is paid I think that is a tie to the community. They'll pay the bondsman but they won't pay the attorney, from my experience.

Mr. HUGHES. I agree with you, it is important.

I thank you.

Mr. SAWYER. It is interesting to hear you allude to another landmark case by means of Escobedo. These Escobedos, apparently, create quite a bit of legal authority in this country.

Magistrate PALERMO. Well, it was my case, originally, and I didn't use that wording in the fifth circuit which I used for the standard. It was a very interesting case. As I say, my wife was threatened at the time, when I was married, and every terrorist in

south Florida, I am told, was in the courtroom for the various hearings. But it was interesting, I enjoyed it. But it has made law, and I think the fifth circuit at that time made good law. It has helped the courts rather than confused us more than any decision. Many of the decisions we are getting now are confusing us more than helping us.

Mr. SAWYER. I was just alluding to the fact that there was a Danny Escabedo in Chicago, that the *Escabedo* case became quite a case before it was kind of eclipsed by *Miranda*, but then we're hearing of other Escabedos.

Magistrate PALERMO. Well, I had the same problem with Palermos. I was mistaken for Blinky Palermo in Las Vegas and enjoyed the finest and didn't know why until somebody told me, and absolutely no relationship. But I enjoyed it at that particular time, under those circumstances, getting priority at the night clubs for dinner. [Laughter.]

Mr. SAWYER. I yield, Mr. Chairman.

Mr. HUGHES. Thank you, Judge. You have been very helpful. And I hope that you can enjoy Washington for a few hours anyway.

Magistrate PALERMO. Oh, I've been coming here for 47 years.

Mr. HUGHES. That's good. It's good to see you.

Magistrate PALERMO. But you did pick a good time, with all the flowers and everything in bloom.

Mr. HUGHES. We tried to plan it that way for you.

Magistrate PALERMO. I'm sure you did, and I appreciate it. I'm coming from Florida and can say it's so good here. I appreciate it.

Mr. HUGHES. Have a safe journey back home.

Magistrate PALERMO. Thank you.

Mr. HUGHES. Our next witness is Arthur Helton, the director of the political asylum project of the Lawyers Committee for International Human Rights, based in New York City. Mr. Helton is a graduate of the New York University Law School. After graduation he was with the Criminal Appeals Bureau of the Legal Aid Society of the city of New York. Immediately before assuming his current position, he practiced immigration law with a private law firm in New York City.

Mr. Helton is chairman of the Immigration and Nationality Law Committee of the Association of the Bar of the City of New York.

Mr. Helton, we are pleased to have you with us today. We have your statement which, without objection, will be made a part of the record; and we hope you can summarize it.

#### TESTIMONY OF ARTHUR HELTON, DIRECTOR, POLITICAL ASYLUM PROJECT, LAWYERS COMMITTEE FOR INTERNATIONAL HUMAN RIGHTS

Mr. HELTON. Thank you, Mr. Chairman and members.

I would particularly like to comment today on the proposed provisions concerning the political offense exception to extradition, including the standards by which to determine whether or not the defense in question is political in character. I also wish to comment upon the need, in our view, to maintain the power of the Federal courts to determine whether or not a request for extradition is

merely a pretext for persecution on account of race, religion, membership in a particular social group, nationality, or political opinion.

At the outset I would like to say the political offense analysis should be the same as that utilized in the refugee and asylum area and Federal court jurisdiction should be retained in order to square the extradition procedure in the United States with the law and treaty obligations that the United States has respecting those who apply for political asylum and seek entitlement to refugee status.

The bill that we are looking at here today essentially retains the definition of political offense with respect to certain offenses. However, it excepts absolutely or conditionally certain of those offenses from the political offense analysis. Some of those include aircraft hijacking, which would be absolutely excepted, or certain violent crimes which would be excepted absent extraordinary circumstances.

Now, no standards are set forth in the bill to define what circumstances should be deemed extraordinary. This concept was, introduced in a predecessor bill in the 97th Congress to add an element of flexibility to the political offense analysis. In fact, however, in our view, it simply engrafts on the political offense analysis a further, but somewhat limited, inquiry with respect to some but not all of the offenses. The traditional and formalistic notion that has been alluded to by others before you of what is a political offense is otherwise retained.

I think the statement in the *Mackin* case, in terms of the standard for defining political offenses is instructive. Essentially, in order to determine whether or not the offense in question was political, one has to show whether there was a war, rebellion, revolution, or political uprising at the time and site of the commission of the offense. Further, one has to show whether the offender was a member of the uprising group and finally whether the offense was incidental to or in furtherance of the political uprising.

The courts have agonized over these formalistic, traditional notions, particularly with respect to what constitutes an uprising and trying to square that standard with terroristic activities. And the courts have had great difficulty in that connection.

Now, in terms of the so-called rule of noninquiry, if I could just address that for a moment and then talk about our concerns both with respect to the political offense analysis and the rule of noninquiry. In terms of noninquiry, the current bill essentially prohibits the courts from inquiring into the background of an extradition request. That prerogative is left exclusively with the Secretary of State, and that is somewhat at variance with the current law. Under current law the courts, while ordinarily declining to withhold extradition, expressly reserve the right, in appropriate instances, to inquire into the background of an extradition request. Indeed, many times the courts have taken into consideration the adequacy of the judicial procedures in the country in question, et cetera.

Now, our concern with respect to both items, the political offense analysis and the rule of noninquiry, is that essentially they should be squared with their analogs in the asylum and refugee area. The other side of the political offense exception to extradition is the



question whether to grant political asylum in the United States to an alien who has been charged with or convicted of a crime. The nature of the inquiry and the standards employed in the refugee and asylum area and in the extradition area should be the same; otherwise, we face the peculiar anomaly of a refugee who may be extradited to face persecution.

It is instructive, then, to refer to in the asylum and refugee context. In the asylum context, in terms of whether or not an alien merits political asylum, ordinarily he or she has to establish a well-founded fear of persecution upon return to the country of national origin on account of race, religion, nationality, membership in a particular social group, or political opinion.

In that respect, one is not entitled to refugee status and can be denied asylum if there are serious reasons for considering that the alien has committed a serious nonpolitical crime outside the United States. We then return to the question of what is a serious nonpolitical crime, and more pertinently, in terms of this legislation, what is a political offense.

The Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, which has been recognized by the courts and the administrative authorities in the asylum area as persuasive, restates the history and the experience of the U.N. under the same refugee standard that we abide by in this country. The handbook, in determining if an offense is political in character, looks to the nature and purpose of the offense in question, including motive, unlike the suggestion in some of the case law in the extradition aimed, and the relationship between the offense and its alleged political purpose and objective, including whether or not the offense is grossly out of proportion to the alleged objective.

This is a much more flexible, individual-oriented analysis. It does not depend upon a characterization as to whether or not there is an "uprising" or not.

With respect to the rule of noninquiry and the nature of review in the asylum area there is initial administrative review of an alien's request for political asylum. In that regard there is a full factfinding opportunity before an administrative officer, with entitlement to process and to discovery upon the showing required under the regulations. In sum there is a full opportunity to present a case and show that an alien has a well-founded fear of persecution.

In deportation proceedings an adverse agency determination can be reviewed in the appropriate court of appeals on petition for review. In the exclusion context, an adverse agency decision can be reviewed by writ of habeas corpus in a Federal district court with a further review and appellate review available in both contexts. The courts have not hesitated, under appropriate circumstances, to review asylum cases, including reviewing the facts which underlie the asylum determinations to determine whether or not there is substantial evidence in the record to support the agency determination. Some of those cases are referred to in my statement.

To the extent that the courts do not, or cannot, review a political offense determination, then to that extent, as I said before, asylum

applicants in the United States, or asylum seekers who are ultimately awarded refugee status in the United States, risk a peculiar anomaly; namely, in particular an asylum seeker may be granted asylum because of the political character of the offense in question but extradited to face persecution if the Secretary of State, under the current bill, disagrees about the characterization of the offense for whatever reason, including ideological or other policy considerations.

The Department of State, on the asylum side, plays expressly an advisory role. To give the Secretary of State an exclusive role in the extradition context would simply introduce the risk that the decision would be made as a matter of political expedience rather than neutral principle. For that reason, it is our view that the review by the independent judiciary should be maintained in the extradition context, both in connection with a neutral and individualistic inquiry on the question of political offense and whether or not a request for extradition is really a pretext for persecution.

Thank you.

[The statement follows:]

#### PREPARED STATEMENT OF ARTHUR C. HELTON ON U.S. EXTRADITION AND ASYLUM POLICY

##### INTRODUCTION

Chairman Hughes, thank you for inviting me to appear at today's hearing. My name is Arthur Helton. I am the director of the Political Asylum Project of the New York based Lawyers Committee for International Human Rights.

Since 1978, the Lawyers Committee has been a public interest law center working in the area of international human rights, refugee and asylum law. The Political Asylum Project of the Committee was created in late 1980 to provide representation to individual asylum applicants in the United States. The Project utilizes volunteer lawyers whom it trains and supervises. Since 1978, the Lawyers Committee has represented more than 250 asylum applicants from over 30 countries. Based on this experience, the Committee has testified in Congress and prepared papers on various asylum and refugee policy matters.

Our testimony today concerns H.R. 2643, a bill to amend Title 18 of the United States Code with respect to extradition. In particular, I wish to comment upon the proposed provisions concerning the "political offense" exception to extradition, including the standards by which to determine whether an offense is political in character. I also wish to comment upon the need to maintain the power of the courts to inquire into whether a request for extradition is a mere pretext for persecution on account of race, religion, nationality, membership in a particular social group and political opinion. In our view, the political offense analysis should be the same as that utilized in the refugee area, and federal court jurisdiction should be retained in order to square the extradition procedure with United States law and treaty obligations regarding the treatment of persons who apply for political asylum in the United States.

##### THE PROPOSED POLITICAL OFFENSE EXCEPTION

The bill codifies prior law in that a person whose extradition is sought is permitted to raise as a defense the fact that the offense in question was a "political offense."<sup>1</sup> Prior law is modified in the bill in that certain offenses, such as airplane hijacking, are expected absolutely from the term "political offense."<sup>2</sup> Others, includ-

<sup>1</sup> The court shall not order a person extraditable after a hearing under this section if the court finds . . . the person has established by the preponderance of the evidence that any offense for which such person may be subject to prosecution or punishment if extradited is a political offense. Section 3194(d)(2)(C).

<sup>2</sup> For the purposes of this section, a political offense does not include—

Continued



ing certain crimes of violence, are excepted, absent the existence of "extraordinary circumstances."<sup>3</sup> No standards are set forth in the bill to define what circumstances should be deemed "extraordinary." This concept was introduced in a predecessor bill in the 97th Congress to add an element of flexibility to the "political offense" analysis.<sup>4</sup> In fact, however, it simply engrafts onto the analysis a limited inquiry into the circumstances surrounding the commission of some offenses. The traditional, formalistic notion of what is a "political offense" is otherwise retained.

#### THE TRADITIONAL POLITICAL OFFENSE EXCEPTION

The standard employed by the courts in the United States to determine whether extradition should be refused on the grounds that the offense in question is a political one is derived from a leading nineteenth century British case, *In re Castioni*,<sup>5</sup> which provide that such offenses must be "incidental to and [have] formed a part of political disturbances." Relatively few American Courts have addressed the issues recently. Two recent American cases, *Matter of Mackin*,<sup>6</sup> in which extradition was denied, and *Eain v. Wilkes*,<sup>7</sup> in which it was permitted, serve to illustrate the prevailing standard.

In *Mackin*, the court reviewed the case law and distilled the following factors to determine whether the Offense in question was political: (1) Whether there was a war, rebellion, revolution of political uprising at the time and site of the commission of the offense; (2) whether Mackin was a member of the uprising group; and (3) whether the offense was "incidental to" and "in furtherance of" the political uprising.<sup>8</sup>

*Mackin* involved a request by the United Kingdom for the extradition of a member of the Provisional Irish Republican Army (PIRA) for the attempted murder of a British undercover soldier. As to the existence of a political uprising, the court concluded that "... there was a political conflict in Andersontown, Belfast, Northern Ireland in March of 1978 which was part of an ongoing political uprising, fluctuating in intensity, but nevertheless of sufficient severity to satisfy the first prong of the political offense exception."<sup>9</sup> The court's determination relied on: (1) the high level of violence in the area at that time; (2) the presence of 13,000 British troops, 420 of whom were stationed in Andersontown to contain the violence; (3) the existence of three British army forts in the immediate locale; (4) the establishment of special non-jury courts by emergency legislation to deal with the rise in terrorism; (5) the derogations filed by the United Kingdom from the European Convention of Human Rights to allow it to forego its obligations thereunder by virtue of the existence of a "public emergency threatening the life of a nation;" and (6) the campaign of violence maintained by the PIRA aimed at British army and Loyalist forces

(A) an offense within the scope of the Convention for the Suppression of Unlawful Seizure of Aircraft (signed at The Hague on December 16, 1970);

(B) an offense within the scope of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (signed at Montreal on September 23, 1971);

(C) a serious offense involving an attack against the life, physical integrity, or liberty of internationally protected persons (as defined in section 1116 of this title), including diplomatic agents;

(D) an offense with respect to which a multilateral treaty obligates the United States to either extradite or prosecute a person accused of the offense;

(E) an offense that consists of the manufacture, importation, distribution, or sale of narcotics or dangerous drugs; or

(F) an attempt or conspiracy to commit an offense described in subparagraphs (A) through (E) of this paragraph, or participation as an accomplice of a person who commits, attempts, or conspires to commit such an offense. Section 3194(e)(2).

<sup>3</sup> For the purposes of this section, a political offense, except in extraordinary circumstances, does not include—

(A) an offense that consists of homicide, assault with intent to commit serious bodily injury, kidnapping, the taking of a hostage, or a serious unlawful detention;

(B) an offense involving the use of a firearm (as such term is defined in section 921 of this title) if such use endangers a person other than the offender;

(C) rape; or

(D) an attempt or conspiracy to commit an offense described in subparagraph (A), (B), or (C) of this paragraph, or participation as an accomplice of a person who commits, attempts, or conspires to commit such an offense. Section 3194(e)(3).

<sup>4</sup> H.R. Rep. No. 97-627, Part I, 97th Cong. 2d Sess. 24 (1982).

<sup>5</sup> [1891] 1 Q.B. 149.

<sup>6</sup> No. 80 Cr. Misc. 1, slip op. at 54 (S.D.N.Y. Aug. 13, 1981), Habeas corpus denied, 668 F.2d 122 (2d Cir. 1981).

<sup>7</sup> 641 F. 2d 504 (7th Cir. 1981), cert. denied, 454 U.S. 894 (1981).

<sup>8</sup> 668 F.2d 122 at 125.

<sup>9</sup> No. 80 Cr. Misc. 1, slip op. at 54 (S.D.N.Y. Aug. 13, 1981).

against British Dominion of Northern Ireland, and in support of a unified, independent Irish nation.<sup>10</sup>

As to Mackin's membership in the uprising group, the court found that the requisite connection to the group had been established. The alleged acts were in conformity with a member's general functions in the PIRA, and Mackin "bore no personal ill-will or malice toward the victim-soldier."<sup>11</sup>

As to the question of whether the act was "incidental to" and "in furtherance of" a political disturbance, the court found that while the acts had not been "pre-planned and directed by the PIRA" the requisite "substantial tie" between the alleged offense and the political activity and goals of the group had been shown in the "necessity of the situation."<sup>12</sup>

The second case, *Eain v. Wilkes*<sup>13</sup> involved a Jordanian national and a member of the Fatah faction of the Palestine Liberation Organization (PLO) whose extradition to Israel was requested on charges of murder and aggravated harm. Eain was alleged to have planted a bomb in the market area of Tiberias during a Jewish religious festival and youth rally. The blast had killed two boys and maimed and/or injured 36 other persons.

As to the political disturbance requirement, the court noted that it must constitute a "war, revolution or rebellion." The court distinguished the nature of the conflict in Israel from other disturbances where the political offense exception had been sustained, explaining that those "cases involved ongoing, organized battles between contending armies, a situation which, given the express nature of the PLO, may be distinguished."<sup>14</sup>

As to the question of whether or not the act was "incidental to" and "in furtherance of" a political uprising, the court held that there had been a failure to prove a direct link between the bombing and the political goals of the PLO. The individual's motives in committing the offense, furthermore, was held to have no bearing of the political character of the act.<sup>15</sup>

The applicability of the political offense exception to terrorist attacks was limited in Eain as well. The court relied on another nineteenth century British case which excluded from acts classified as "political offenses" those which are "directed primarily against the separate body of citizens." The case involved a bombing of an army barracks and a Parisian cafe by an anarchist. The political exception was held not to apply on the ground that "the party of anarchy is the enemy of all government."<sup>16</sup> The court in Eain identified the following factors as relevant to the determination: (1) The civilian status of the victims and the randomness of their selection; and (2) the objectives supposed common to both terrorist and anarchist activity, namely "the destruction of a political system by undermining the social foundation of the government."<sup>17</sup>

The court drew the distinction between terrorist activity and activity eligible to be classified as political offenses as the difference between "acts that disrupt the political structure of the state," and those that disrupt "the social structure that established the government." Terrorist activity, unlike political activity conforming to the test, "seeks to promote social chaos," in contrast to activity occurring in the context of "[a]n ongoing, defined clash of military forces."<sup>18</sup>

The court applied these principles and found that the bombing failed to qualify as a political offense only because of its specific character as an "isolated act of violence." The PLO, the court found, "directs its destructive forces at a defined civilian populace" to further its aim of "[destroying] the Israeli political structure as an incident of the expulsion of a certain political structure as an incident of the expulsion of a certain population from the country."<sup>19</sup> there was no proof that the bombing was linked to PLO political and strategic objectives, particularly in view of the "terrorist" character of those objectives.

<sup>10</sup> Id.

<sup>11</sup> Id.

<sup>12</sup> Id.

<sup>13</sup> 641 F. 2d 504 (7th Cir. 1981), cert. denied, 454 U.S. 894 (1981).

<sup>14</sup> Id. at 519.

<sup>15</sup> Id. at 520.

<sup>16</sup> Id. at 521, citing *In re Meunier*, [1894] 2 Q.B. at 419.

<sup>17</sup> Id. at 521.

<sup>18</sup> Id. at 521-522.

<sup>19</sup> Id. at 520 n. 19.

## THE RULE OF JUDICIAL NONINQUIRY

H.R. 2643 also prohibits the courts from inquiring into the background of an extradition request. That prerogative is left with the Secretary of State."<sup>20</sup> This is at variance with current law.

Under current law, the courts, while ordinarily declining to withhold extradition, reserve the right to inquire into the background of an extradition request. The leading case is *Gallina v. Fraser*,<sup>21</sup> in which the court rejected the claim of the individual in question that upon return to Italy he would be imprisoned without a new trial and an opportunity to face his accusers or to conduct any defense. The court explained that proceedings in foreign courts did not have to conform to American concepts of due process, and that the court was without authority "to inquire into procedures which await the accused upon extradition." The ruling in *Gallina* has been followed in a number of cases.<sup>22</sup>

Nevertheless, the principle of judicial self-restraint expressed in *Gallina* is not absolute. Indeed, the *Gallina* court itself noted that "[W]e could imagine situations where the relator, upon extradition, would be subject to procedures or punishment so antipathetic to a federal court's sense of decency as to require re-examination of [the] principle [of non-inquiry]. This is not such a case."<sup>23</sup>

In another case, *Matter of Sindona*,<sup>24</sup> where the accused also alleged that he would be denied a fair trial if extradited to Italy, the court did, in fact, discuss the nature of Italy's judicial procedures. In rejecting the individual's claim, the court emphasized that *Sindona* has "not even made a threshold showing that he would be subject to procedures in Italy that he would be so violative of human rights as to prevent extradition. There is no indication that the materials submitted by *Sindona* that the Republic of Italy subjects accused persons to anything approaching summary proceedings or Kangaroo courts which occur in nations which disregard human rights. Italy has a criminal justice system which comports with standards of the civilized world."<sup>25</sup> The Italian government, the court noted, is "evidencing its intention and ability to keep the criminal justice system functioning in a proper manner."<sup>26</sup>

In other cases, courts implicitly have made judgments about the quality of the judicial safeguards in the requesting country. For instance, in *Magasino v. Locke*,<sup>27</sup> the court rejected the claim that evidence against the defendant had been obtained pursuant to an illegal wiretap, explaining that "we hold the Canadian courts in the highest respect and entertain no doubt that, if appellant is tried in Canada, the Canadian courts will afford appropriate protection to appellant under pertinent Canadian law."<sup>28</sup>

A concern with the fairness of the foreign judicial system may also have formed the basis of the court's denial of an extradition request by Greece in another case, *In re Mylonas*.<sup>29</sup> There, the court ruled that a delay of three years between the ini-

<sup>20</sup> Any issue as to whether the foreign state is seeking extradition of a person for the purpose of prosecuting or punishing the person because of such person's political opinions, race, religion, or nationality shall be determined by the Secretary of State in the discretion of the Secretary of State. Any issue as to whether the extradition of a person to a foreign state would be incompatible with humanitarian considerations shall be determined by the Secretary of State in the discretion of the Secretary of State. Section 3194(e)(4)(A) and (B).

<sup>21</sup> 278 F. 2d 77 (2d Cir. 1960).

<sup>22</sup> See, *Matter of Sindona*, 450 F. Supp. 672 (S.D.N.Y. 1978), *aff'd*, sub nom. *Sindona v. Grant*, 619 F.2d 167 (2d Cir. 1980) (upholding extradition to Italy; argument about the fairness of a trial in the requesting country "was not properly addressed to a court in an extradition hearing but must be made to the Department of State, which has primary responsibility for determining whether treaties with foreign countries are being properly respected . . . and (which) has authority to deny extradition on humanitarian grounds, if it appears unsafe to surrender *Sindona* to Italian authorities."); *Garcia-Guillern v. United States*, 450 F.2d 1189 (5th Cir. 1971) (sustaining extradition to Peru; ". . . (we are not permitted to inquire into the procedures which await the appellant upon his return); *In re Ryan*, 360 F. Supp. 270 (E.D.N.Y. 1973) (upholding extradition to West Germany; "Extraditing court will not inquire into procedures awaiting detainee upon extradition; 'the conditions under which a fugitive is to be surrendered to a foreign country are to be determined solely by the non-judicial branches of the government.'")

<sup>23</sup> 278 F.2d 77 at 79.

<sup>24</sup> 450 F. Supp. 672 (S.D.N.Y. 1978), *aff'd* sub nom. *Sindona v. Grant*, 619 F.2d 167 (2d Cir. 1980).

<sup>25</sup> 450 F. Supp. at 695.

<sup>26</sup> *Id.* at 695.

<sup>27</sup> 545 F.2d 1228 (9th Cir. 1976).

<sup>28</sup> 545 F.2d 1228 at 1230. See also, *Peroff v. Hylton*, 542 F.2d 1247 at 1249 (4th Cir. 1976), where the court upheld Sweden's extradition request, noting "(t)here is no basis for suspecting Sweden's criminal processes, or supposing that Sweden cannot and will not adequately provide for Peroff's protection . . ."

<sup>29</sup> 187 F. Supp. 716 (N.D. Ala. 1969).



tial proceeding against Mylonas and the Greek government's request violated the terms of the relevant extradition treaty. While grounding is holding on the three-year lapse, the court also noted that the original hearing in Greece had been held in absentia, without the defendant's knowledge, without giving him legal representation, and with no opportunity to cross-examine adverse witnesses or to present favorable evidence.

#### OUR CONCERNS

The other side of the political offense exception to extradition is the decision whether to grant political asylum in the United States to an alien who has been convicted of a crime. The nature of the inquiry and the standards employed in the extradition areas should be the same as those in the asylum area. Otherwise, a refugee may be extradited to face persecution. It is instructive, then, to refer to the procedures and standards by which it is determined whether a crime is political in nature and, therefore, does not preclude a grant of asylum.

An alien merits political asylum in the United States if he has been persecuted or has a well-founded fear of persecution upon return to his country of national origin on account of race, religion, nationality, membership in a particular social group, or political opinion.<sup>30</sup> An application for asylum, however, can be denied if there are "serious reasons for considering that the alien has committed a serious non-political crime outside the United States. . . ." <sup>31</sup>

The statute and regulations do not define what constitutes a serious, non-political crime. In a leading administrative case, the Board of Immigration Appeals looked to the United Nation's High Commissioner's "Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees" (Geneva 1979) ("Handbook") in order to decide the issue.<sup>32</sup>

The Handbook provides specific guidance in determining what constitutes a political offense. It teaches that the inquiry should focus upon the nature and purpose of the offense in question, including motive; and the relationship between the offense and its alleged political purpose and objective, including whether the offense is grossly out of proportion to the alleged objective. It states in pertinent part:

"In determining whether an offence is 'non-political' or is, on the contrary, a 'political' crime, regard should be given in the first place to its nature and purpose, i.e., whether it has been committed out of genuine political motives and not merely for personal reasons or gain. There should also be a close and direct causal link between the crime committed and its alleged political purpose and object. The political element of the offence should also outweigh its common-law character. This would not be the case if the acts committed are grossly out of proportion to the alleged objective. The political nature of the offence is also more difficult to accept if it involves acts of an atrocious nature (§ 152).

"What constitutes a 'serious' non-political crime for the purposes of this exclusion clause is difficult to define, especially since the term 'crime' has different connotations in different legal systems. In some countries the word 'crime' denotes only offences of a serious character. In other countries it may comprise anything from petty larceny to murder. In the present context, however, a 'serious' crime must be a capital crime or a very grave punishable act. Minor offences punishable by moderate sentences are not grounds for exclusion under Article 1 F(b) even if technically referred to as 'crimes' in the penal law of the country concerned (§ 155).

"In applying this exclusion clause, it is also necessary to strike a balance between the nature of the offence presumed to have been committed by the applicant and the degree of persecution feared. If a person has well-founded fear of very severe persecution, e.g., persecution endangering his life or freedom, a crime must be very grave in order to exclude him. If the persecution feared is less serious, it will be necessary to have regard to the nature of the crime or crimes presumed to have been committed in order to establish whether the applicant is not in reality a fugi-

<sup>30</sup> 8 U.S.C. §§ 1101(a)(42), 1158. See *Stevic v. Sava*, 678 F.2d 401 (2d Cir. 1982), cert. granted, 51 U.S.L.W. 3633, No. 83-973 (Feb. 28, 1983).

<sup>31</sup> 8 U.S.C. § 1253(h)(2), 8 C.F.R. 208.8(f)(v). This exclusion provision corresponds to an exclusion clause under Article 1 of the United Nation Convention and Protocol.

<sup>32</sup> *Matter of Rodriguez-Palma*, 17 I&N Dec. 465 (BIA 1980). The United States Court of Appeals for the Second Circuit has cited the Handbook as representing a restatement of the "High Commissioner's 25 years of experience, the practices of the governments acceding to the Protocol and literature on the subject." *Stevic v. Sava*, 678 F.2d 401, 406 (2d Cir. 1982), cert. granted, 51 U.S.L.W. 3633, NO. 82-973 (Feb. 28, 1983).

tive from justice or whether his criminal character does not outweigh his character as a bona fide refugee (§ 156)."<sup>33</sup>

In terms of the nature of review in the asylum context, there is initial administrative review of an alien's asylum claim, including whether the alien has committed a serious, non-political offense.<sup>34</sup> In deportation proceedings, an adverse determination by the agency can be reviewed by a petition for review to the appropriate Circuit Court of Appeals, with further review available in the United States Supreme Court.<sup>35</sup> In exclusion proceedings, and adverse agency decision can be reviewed via habeas corpus in the appropriate District Court, with further review available in the Circuit Court and Supreme Court.<sup>36</sup> The courts, moreover, have not hesitated to review asylum cases.<sup>37</sup> In sum, judicial review is available in the consideration of an asylum claim, including the resolution of the question of whether an offense is "political" in character.

Two cases, *Matter of McMullen* in which extradition was denied,<sup>38</sup> and *Matter of Sindona* in which it was permitted,<sup>39</sup> provide useful illustrations of the relationship between international extradition and the refugee/asylum areas. They also demonstrate the competence of the courts to decide the persecution issue.

McMullen involved a request for extradition to the United Kingdom in connection with the 1972 bombing of a British army barracks in North Yorkshire. McMullen had deserted the British army in 1972, when he became involved with the Provisional Irish Republican Army (PIRA). In 1974 an Irish court had convicted him of PIRA membership and of carrying firearms and had sentenced him to three years in prison. Upon his release, the PIRA sought to recruit him for further service and threatened reprisals when he declined. McMullen escaped to the United States, where he was arrested for carrying a false passport. Scotland Yard detectives were permitted to question him about his participation in past PIRA activities, whereupon the United Kingdom demanded his extradition. A federal magistrate, however, found that the act alleged met the traditional criteria for the political offense exception and denied the request.

Subsequently, the Immigration and Naturalization Service attempted to deport McMullen to Northern Ireland. McMullen invoked the withholding of deportation provisions of the Immigration and Nationality Act,<sup>40</sup> which forbids the deportation of persons likely to suffer political persecution. He claimed that the Irish authorities could not prevent the PIRA from persecuting him. The court disallowed his deportation on that basis.

The second case, *Matter of Sindona*, involved a charge of the Italian crime of "fraudulent bankruptcy." Sindona argued that he was exempt from extradition under the Protocol Relating to the Status of Refugees which precludes the expulsion or return of a refugee whose life or freedom would be threatened, inter alia, on account of his political opinion. His theory was that the Protocol "creates a broader exception to the extradition power than does the language of the Italo-American treaty as to an offense of a political character."<sup>41</sup> The court drew attention to the limiting language of Article 1F, which denies applicability of the provisions of the Convention "... to any person with respect to whom there are serious reasons for considering that . . . (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee . . ." <sup>42</sup> The court's rejection of the political offense claim, however, was held to effectively rule out appeal to the Protocol.

To the extent that the courts do not review the political offense determination, then, to that extent, asylum applicants risk a peculiar anomaly. In particular, an asylum seeker may be granted asylum because of the political character of the offense in question, but extradited to face persecution if the Secretary of State disagrees about the character of the offense for whatever reason. The Department of

<sup>33</sup> The Handbook also considers the question of whether hijacking constitutes a serious non-political crime within the meaning of the exclusion clause (§§ 159-161). It basically concludes that the question should be "carefully examined in each individual case" under the general criteria of refugee recognition (§ 161).

<sup>34</sup> 8 C.F.R. §§ 3.1(b), 208.1, 208.8(f)(iv) 208.9, 208.11, 236.7, and 242.21.

<sup>35</sup> 8 U.S.C. § 1105a(a).

<sup>36</sup> 8 U.S.C. § 1105a(b).

<sup>37</sup> See, e.g., *Reyes v. INS*, 693 F.2d 597 (6th Cir. 1982), *McMullen v. INS*, 658 F.2d 1312 (9th Cir. 1981).

<sup>38</sup> No. 2-78-1099 MG, slip op. (N.D.Cal. May 11, 1977).

<sup>39</sup> 450 F. Supp. 672 (D.C.N.Y. 1978) aff'd sub nom. *Sindona v. Grant*, 619 F.2d 167 (2d Cir. 1980).

<sup>40</sup> 8 U.S.C. § 1253(h).

<sup>41</sup> Id. at 694.

<sup>42</sup> Id. at 694.



State plays only an advisory role in asylum adjudications.<sup>43</sup> To give the Secretary of State an exclusive role in the extradition context would introduce the risk that the decision would be made as a matter of political convenience rather than based upon neutral principles. Review by the independent judiciary should be maintained in the extradition context.

#### CONCLUSION

There are many countries throughout the world that are unable, or unwilling, to provide the protections guaranteed by our judicial system. In many countries where a pattern of human rights violations are occurring, it is often the case that political opponents of the government are charged with criminal law violations. These charges are the pretext for arbitrary detention, in some cases without a proper trial or due process of the law. In these situations it would be highly inappropriate for the United States to grant an extradition request involving a political opponent of the requesting government.

A decision by the State Department to grant extradition without adequate judicial review would raise a distinct possibility that innocent people would be extradited and returned to face persecution in their home country. Moreover, governments that wish to take reprisals against their political opponents living in exile would simply charge them with violation of the criminal law as a means of securing their extradition. The most appropriate way to protect against these abuses would be to maintain the role of an independent judiciary in the extradition process.

Mr. HUGHES. The gentleman from Michigan.

Mr. SAWYER. Well, you get cases such as we had with James Earl Ray, who fled to England after the assassination of Martin Luther King. And I presume you know that he meant that as a political assassination. I had the opportunity to interview Ray, and I know that he did. But I don't think that that, you know, anything like that—obviously, we would have been very upset if England had refused extradition. And, you know, I would think we certainly have to apply the same rules here.

Mr. HELTON. I do not think anything I say would mitigate otherwise. We do not quarrel with the idea of extradition at all. Our concern is that we not place bona fide refugees in a position where they may be extradited to countries upon a request for extradition which is a pretext for persecution.

And I do not think that it is a hypothetical situation that we are talking about. We now have extradition treaties with El Salvador, Haiti, Iraq, Nicaragua, Pakistan, Poland, South Africa, and Yugoslavia. Those are countries in which both the State Department and other independent monitors of human rights, including the Lawyers Committee for International Human Rights, have identified the problems concerning their human rights records. The nationals of those countries who we award refugee status to, we simply submit, should not face or be extradited by those countries when that extradition request is merely a pretext for persecution.

Mr. SAWYER. Of course, these are, you know, these questions are really so subjective that it's a pretty hard thing to find a set of—for example, if somebody is a known American Nazi or something of that variety and ends up in some fracas and commits some violent crime and flees to another country, he probably would make a pretty persuasive case that he is not going to be given, you know, great friendly treatment here by our juries or what not if it is in the context of his running around in a Nazi parade uniform or something. It is hard for me to see how we can precisely define

<sup>43</sup> 8 C.F.R. § 208.7.

that kind of thing, because a lot of it depends on where you are looking at it from.

I'm sure you know we have the view that we're not given to political persecution; yet I think at least any American lawyer would recognize that the fellow was going to have some considerable prejudice against him if he appeared before an American jury, and whatever the violence that he had done had been committed in a neo-Nazi uniform.

Now, I just wonder how far you can go without trying—you have to recognize there's some subjectivity.

Mr. HELTON. In practice there is, unfortunately, some impermissible subjectivity on the asylum side. There is, however, an international definition of refugee to which we subscribe, and which has been enacted into statute. It is a United Nations definition contained in something known as the Protocol Relating to the Status of Refugees. There is content to that definition in the sense that it defines as refugees those persons who have a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

So, the inquiry that we suggest be maintained with respect to the extradition request is not as wide ranging as whether or not the judicial procedures in a country are adequate, but rather whether the extradition request really is a pretext for persecution, on account of race, religion, nationality, membership in a particular social group, or political opinion.

Mr. SAWYER. Let me ask, don't we just determine whether there is probable cause for having committed a crime that would be a crime under the laws of the United States, also?

I think we are dealing with a totally different thing when we are dealing with someone claiming asylum and somebody who has committed a crime serious enough to be a serious crime under the laws of the United States had it been committed here. I don't know if we can quite indulge the same liberality as we might indulge in whether or not to grant someone asylum.

Mr. HELTON. Well, the question is, can the person who is the subject of the extradition request, and who is a beneficiary of the grant of political asylum, show that that crime that he is charged with having committed abroad, whether it be, for example, a crime of violence, is really a bogus charge and that the extradition request is really a pretext for persecution.

Mr. SAWYER. Don't you feel that there is a required showing under the act?

Mr. HELTON. In our view the probable cause determination is too narrowly drawn to comprehend our concerns, which relates very specifically to persons who are entitled to refugee status, and who have been able to show that they would be persecuted in the country in question.

It is a fairly modest proposal in that connection, and one which could affect a small number of very vulnerable refugees.

Mr. SAWYER. I yield back, Mr. Chairman.

Mr. HUGHES. Thank you, Mr. Helton.

Can you cite any specific instances, whether in an asylum or extradition case, where the Secretary of State has decided to return a person to a foreign government, and has found that the person was

thereafter subjected to torture, unfair treatment, or political discrimination or racial discrimination?

Mr. HELTON. The cases that I know about really do not go that far. We have not yet been faced with a situation in which that has occurred.

As I mentioned before, though, in our view the situation is not at all a hypothetical one, and certainly there are cases in which both situations have come up, as cited in my statement, where persons have either been awarded or denied refugee status and their extradition, has then been sought, their extradition has been denied and their deportation sought. The issues have been raised in those cases.

So, it is certainly more than a theoretical possibility that, for example, a person could be ordered extradited and apply for political asylum at that point, seeking to show that they have a well-founded fear of persecution. What procedure would ultimately govern? That is unclear under the way that the extradition and asylum and refugee laws currently interface.

Mr. HUGHES. Wouldn't you agree that with the literally hundreds of extradition cases that we are faced with in a year, the present procedure, is adequate in such instances, or at least it indicates a pretty good track record, and as has been often said, "if it ain't broke, don't fix it?"

Mr. HELTON. As it stands now the courts do have the opportunity to make the inquiry. And what differs, in terms of the legislation being proposed, is that the courts would be restricted in the kind of inquiry that could be made in connection with the background of the extradition request. We submit that little more than current law should be entertained in that connection, particularly as it would apply to refugees.

Mr. HUGHES. You are talking about what area that the courts could inquire into? You're talking about cases that shock the conscience, for instance, that line of cases?

Mr. HELTON. Well, courts that use varying standards when they reserve to themselves power to undertake that kind of review. I would have to say, that ordinarily the courts have declined to withhold extradition, but that they have not only at times evaluated the advocacy of the judicial procedures and the human rights situations in the countries in question, but they have expressly reserved the power to make that inquiry and withhold extradition in appropriate circumstances. I would hesitate to limit the inquiry to simply a substantive due process standard of shocking the conscience.

Mr. HUGHES. I trust that you would feel that any extradition proceeding should be stayed until a request for political asylum has been decided?

Mr. HELTON. Absolutely. That would address very squarely our concern.

Mr. HUGHES. What should be the standard of proof on the issue of political offense?

Mr. HELTON. The burden of proof in the asylum context is on the applicant for political asylum. The precise character of that burden is unspecified, although it is our position that a preponderance of the evidence suffices on the asylum side to show that an alien is



entitled to refugee status in the United States. For that reason there really is no reason to subscribe to a different burden on the extradition side; preponderance of the evidence.

Mr. HUGHES. Who should bear the burden of proof on the issue, the individual or the Government?

Mr. HELTON. I think it would be fair, again, to impose that upon the individual in order to narrow the issues and, again, to correspond to the situation on the asylum side.

Mr. HUGHES. You've testified that, and more materially you've sent to the subcommittee, a suggestion that it would be helpful to look at the laws and regulations on asylum proceedings when we try to structure our position on political offenses for extradition cases. There are obviously a number of factors that we should look at in trying to arrive at an effective definition, such as whether the act was committed for genuine political motives and not merely for personal reasons or gain, and the link between the crime and its alleged political purpose and object.

Do you suggest that these factors and others like them be listed in the statute itself?

Mr. HELTON. I don't think that that is necessary. I think that as long as we simply say "political offense," and make it clear in report language that we are talking about a flexible approach, making it clear that the refugee area is a principal source for that factor analysis.

Mr. HUGHES. How do you square that suggestion with the concept of "extraordinary circumstances" that we have in section 3194(c)(3)?

Mr. HELTON. I think that is a limited recognition of the need for flexibility. The problem is that the extraordinary circumstances standard seems to suggest that it must be more than ordinary background circumstances and considerations or more than simply a balancing test or review of factors. I would be worried, therefore, about the apparently heightened character or limited inquiry that would be allowed under extraordinary circumstances, particularly since the concept does not apply to all of the offenses in question.

Mr. HUGHES. Doesn't that depend, really, on the judge? It sounds like just a lot of lawyers' talk. Extraordinary circumstances are generally what a judge is going to make them out to be; our magistrate, earlier, who seemed to be a very practical chap, I think made the point very well. We talk about the preponderance of the evidence as opposed to clear and convincing evidence, and we talk about directing a jury to disregard the remarks just made by a witness, and we talk about the difference between extraordinary circumstances and normal circumstances. Does it really amount to that much?

Mr. HELTON. I have accepted your invitation to testify here today with that in mind. I think it does matter what we are doing here. I think that it is clear that the courts have wrestled with the issues and really have agonized over such questions as whether there a "political uprising"? when, in fact, we really should invite the courts to take a more direct approach, a more factor-oriented and individual-oriented approach to try and resolve the issue. I think it does matter.

Mr. HUGHES. Well, I get back to my original question, and that is: We seem to have struck a pretty good balance, aside from the one area in which you express some concern, between the political concerns of the State Department, on the one hand, in dealing with other countries, and the problems of comity, and treaties, and all the other problems that are associated with this area of extradition, and, on the other side, trying to protect due process, if you will, for individuals who have legitimate and sometimes not so legitimate reasons for trying to remain in the country. What is wrong with the balance that we have struck? We haven't had any horrendous results, we can't point to any negative consequences from current practice. This legislation would seem to basically codify what has been our experience and it provides some additional protection such as right to counsel, right to appeal, some early proceeding for bail, and some effort to try to define what is not a political offense.

Mr. HELTON. I think there has been a good deal of deliberation and consideration given to the issues. I think, however, that there is a real risk in expressly excepting certain offenses from the political-offense analysis, while retaining a concededly antiquated notion of what is a political offense.

In some sense we have the opportunity at this point, to undertake a more direct reform on this issue of what is a political offense, and we have at our fingertips a very helpful reterent in the terms of asylum and refugee law. So, I think that we really should take advantage of that and not simply further misshape a very misshapen area of the law. In terms of the rule of noninquiry, that is a principal concern of ours at this point, with respect to protecting concededly bona fide refugees, persons who are entitled to political asylum for refugee status.

These are fairly narrow suggestions. We are not quarreling with the basic concept of the legislation.

Mr. HUGHES. I see.

Thank you very much. You have been most helpful.

Mr. HELTON. Thank you.

Mr. HUGHES. Our next witness is Professor Steven Lubet of Northwestern University in Illinois. Professor Lubet is a full professor in the law school and teaches courses on international law and transnational criminal law. Professor Lubet has written extensively on the subject of extradition, and served as a legal adviser to the Israeli Government in extradition cases.

Professor Lubet, we have your statement which, without objection, will be made a part of the record in full. And we hope that you can summarize for us.

Welcome.

#### TESTIMONY OF STEVEN LUBET, PROFESSOR OF LAW, NORTHWESTERN UNIVERSITY

Mr. LUBET. Thank you, Mr. Chairman. I certainly appreciate the opportunity to appear today.

I must make one correction on the introduction that you gave me. I don't think that legal adviser to the Israeli Government is an appropriate title. I have consulted on occasion with the Israeli



Consul General in Chicago, but I don't know that that rises to advisor to the Government of Israel.

Mr. HUGHES. I see. I thought you were going to say you were assistant to the prime minister. [Laughter.]

Mr. LUBET. It may be of some interest to the subcommittee to know that I did have the opportunity to attend, in Tel Aviv, the trial of Ziad Abu Eain, the gentleman who was extradited from the United States to Israel to stand trial for a crime. I understand that his conviction in that case was affirmed by the Supreme Court of Israel the day before yesterday. That is not, of course, what I intend to address in my testimony here today.

As you may recall, Mr. Chairman, I testified about a year ago regarding House bill No. 5227, at which time I suggested that its primary strength was the preservation of the judicial role in the process of extradition. And I also suggested that the definition of a political offense contained therein was too rigid. Both of those matters are addressed rather fully by the current bill, H.R. 2643. I want to discuss with the subcommittee today just three topics: The question of the rule of noninquiry, the definition of a political offense, and then, briefly, the burden of proof in political offense cases.

The rule of noninquiry, as it is contained in H.R. 2643, more or less codifies the traditional division of labor between the courts and the executive in political offense cases. What it does, or what the tradition is, is to allow the courts to look at those facts which concern the defendant and the crime, but reserve to the executive those questions which concern the nature of the requesting government. It seems to me to make eminent sense.

Issues concerning the defendant and the crime comprise litigative facts, the sort of facts which courts decide all the time: Is the charge true? Did it happen? Didn't it happen? Under what circumstances did the events take place? But when you get into the motive of the requesting government, you really depart from the facts and begin to discuss policy: Is the government good or bad? Is it oppressive or fair? Is it duplicitous or honest? Those are not litigative issues, those are not justiciable issues, and I think the courts have very wisely reserved those issues for discussion by the executive branch.

It is important, I think, to recognize that the rule of noninquiry is a judge-made rule; it didn't originate with the executive branch, it originated from the judiciary. The courts, in essence, said, "We don't want to decide, we aren't competent to decide these issues of motive and pretext; that is something that ought to be reserved to the executive." I think it is very appropriate that the statute maintains that division of power between the executive and the courts.

Now, some say that the executive cannot be trusted with sole discretion in these issues. But I think, Mr. Chairman, as you pointed out, the executive has, as far as anyone can tell, a perfect track record; there is not a single case where anyone has suggested that the executive has turned a fugitive or a refugee over to a duplicitous or inhumane government.

And I would like to address the point that Mr. Helton raised concerning harmonizing the political offense exception with the treatment of refugees for the purpose of asylum. Frankly, I am not trou-

bled at all by any seeming disharmony between the two aspects of law; they are really quite distinct. The question of asylum for refugees is a question that arises under our immigration laws, and what is being decided in those cases is whether or not to give an individual relief from deportation: Shall we allow him to stay here? Shall we make him go? He has entered the United States, not under the appropriate quota or without appropriate papers, or he doesn't have the right relatives, and asylum is going to be discussed as to whether or not we are going to apply our own immigration laws in order to put the person out of the country. That is quite different, I think, than the case where someone is wanted for a crime by a country with which we have an extradition treaty which obliges us to return the person for trial. I don't think it is anomalous at all for us to say that although, for the purposes of our domestic law, you may be entitled to asylum and for the purposes just concerning American law we are willing to let you stay here; but there is a competing consideration and now, viewed in the context of the extradition request, you are going to be required to be returned and stand trial.

And I do want to say one other thing: Asylum requests, at least in the context of relief from deportation, are reviewed, in the first instance, by an administrative law judge in the Department of Immigration and Naturalization. If that judge allows the asylum request, then, of course, the relief from deportation is granted and the person will not be deported, asylum is granted. Certainly, we don't make any administrative law judge's determination on that question of asylum binding on the courts of extradition. This would get us back before square one; we'd be worse than we were when we started, in terms of review, if we're going to say that INS immigration judges can make binding determinations of asylum which will preclude future rendition in the case of a crime.

And finally, of course, in the asylum context the central issue is that there is no repudiation of foreign government involved. You don't have the immigration judge in the asylum case saying, "The request for deportation is made in bad taste, is duplicitous." So, you don't have the situation where the judge is passing judgment, actually, on the motives of the foreign country.

With regard, then, to the definition of political offense, I think that the two-tiered approach of H.R. 2643 is appropriate and a very reasonable effort to deal with what is admittedly a very thorny problem. The first tier, of course, excludes completely certain offenses from the political offense exception. The second tier is intended to create some flexibility, to say that certain offenses usually are not political, but that under certain circumstances they may be. I read this as more or less creating a presumption against the application of the political offense exception, at least in cases involving violence. Cases involving violence must be exceptional in order to qualify for the exemption. And that strikes me as a flexible approach. One which sets limits to give guidance to the judiciary, but which preserves some flexibility for the executive. If the judge finds that the circumstances are not extraordinary in the case of a violent crime, all that happens there is that it will be certified to the Secretary of State, who may, in his or her discretion,

still find that the circumstances were such as not to warrant extradition.

However, I do think that some legislative history is necessary here in order to flesh out the term "extraordinary circumstance." As I was speaking to several of the other gentlemen before this hearing began, I think we arrived at four or five possible definitions for extraordinary circumstances, none of which, including my own, is intrinsically better than any other, and each of which might be arrived at by some court barring legislative history as guidance from the Congress.

I would like to suggest a couple of specific changes in the system.

The first is that war crimes, in my view, ought to be included in the first tier of crimes which are never political. Now, Mr. Solf has pointed out to me that under subpart (d), crimes which are war crimes under the Geneva Convention are already crimes which we have a duty to extradite or try, and, therefore, they are presumably included by reference. I think it might be useful to extend that to crimes which would be war crimes if they occurred in an international conflict but which occur only in a noninternational conflict. That is, why bar the extradition of war crimes and crimes between countries, and not also bar for crimes which occur in the course, say, of civil war.

And, additionally, it strikes me that the crime of rape should not be included in the second tier. Perhaps I'm not creative enough, but I cannot conceive of a situation—

Mr. HUGHES. We were hoping you would be.

Mr. SAWYER. We were kind of at a loss, ourselves, and thought maybe you would help us out on it.

Mr. LUBET. I think the crime of rape ought not ever to be considered political offenses. Actually, there are those who say rape is a political crime, a crime against women. And I suppose that view might be shared, but it still ought to be extraditable and punishable under all circumstances.

Some say that the current extradition bill is repressive in nature and political in nature and that it is intended to allow extradition to regimes that are friendly to the United States while preventing worthy fugitives from those countries from achieving asylum here. It strikes me that the inclusion, for example, of aircraft hijacking in nonpolitical crimes belies that argument. Obviously, the commandeering of aircraft is a very common occurrence; people are escaping from Iron Curtain countries, and we have every political reason for wanting to give harbor to those people. Certainly, the current administration is kindly disposed to escapees from Iron Curtain countries. Nonetheless, the bill would require their rendition to those countries with which we have treaties, not because of any ulterior political motive, but rather out of recognition that the crime itself is one which ought not to be countenanced even if committed for the best motives.

Finally, let me conclude, Mr. Chairman, with a comment on the burden of proof. I raised this issue last year at a time when the bill was silent as to burden of proof, and I am pleased to see that now that the bill specifies that the burden of proof shall be on the defendant, which, I think, is appropriate. In the Senate the version of the bill, S. 220, the burden on the defendant is by clear and con-



vincing evidence; the House bill places that burden by preponderance of the evidence. In either case it is good to have the articulation.

My own view is that the burden of proof ought to be clear and convincing evidence. It is difficult for me to conceive of what it would mean to prove the existence of extraordinary circumstances by a preponderance of the evidence. That just doesn't hang together, it doesn't make sense to me. If the circumstances are extraordinary, then the level of proof ought to be clear and convincing; otherwise, you are saying—you are putting the judge in the situation of saying—"Is it more probable than not that the circumstances are extraordinary?"

Mr. SAWYER. May I just interrupt?

Aren't you talking about two different things? The circumstances you are trying to prove might be extraordinary, but the proof of those circumstances would only be provable by a preponderance. You can't—just because the circumstances are attempting to be proved as extraordinary, I don't think that affects the weight of the proof. Aren't you talking about two different things?

Mr. LUBET. Well, I hope not. The bill is written to provide the burden of proving the extraordinary circumstances.

Mr. SAWYER. The only point I was making is that the circumstances, to be extraordinary, he must be—when you prove them, they must be extraordinary, and, therefore, clearly banned. But the proof as to whether those facts existed or not wouldn't be affected by the fact that the facts had to be extraordinary. It seems to me you are mixing apples with oranges when you relate the degree of the proof to the circumstances.

Mr. LUBET. To the seriousness of that which must be proven.

My point, Congressman, is that since the requirement of the seriousness of the fact is so great that the lesser burden of proof doesn't accord with that, we place a great importance on those facts by making them so strenuous it seems to me that we ought to apply, also, a strenuous burden of proof to their determination.

It is accurate that the burden of proof in deportation and asylum cases is preponderance of the evidence. The defendant must prove, by preponderance of the evidence, that he is entitled to asylum. That strikes me as a reason for creating a greater burden of proof in political offense cases, because the issue to be determined is weightier. The U.S. Supreme Court just last term, in *Santosky v. Kramer*, said that the preponderance-of-the-evidence test is used in civil disputes because those are cases where society places no interest on the outcome, society doesn't care who wins just so long as there is a fair trial. So, we utilize preponderance of the evidence.

I think in political offense cases society does have a stake and interest in the outcome, and, therefore, the higher burden of proof is appropriate.

I have nothing further to volunteer, gentlemen.

[The statement follows:]

TESTIMONY OF PROFESSOR STEVEN LUBET BEFORE THE HOUSE  
JUDICIARY COMMITTEE, SUBCOMMITTEE ON CRIME, MAY 5, 1993

SUMMARY

Professor Lubet's testimony concerning House Bill 2643 is limited to a discussion of its proposed treatment of the "political offense" exemption from extradition. Professor Lubet makes the following points:

1. The "Rule of Non-Inquiry" should be maintained. Courts of extradition should not be permitted to inquire into the motives of the requesting government.

2. It is appropriate to divide political offenses into two definitional tiers, and to require that crimes of violence be extraditable except in "extraordinary circumstances." It is necessary to define "extraordinary circumstances" by providing legislative history.

3. The burden of proving the political offense exception should be placed upon the defendant, and proof should be required by "clear and convincing evidence."



TESTIMONY OF PROFESSOR STEVEN LUBET BEFORE THE HOUSE  
JUDICIARY COMMITTEE, SUBCOMMITTEE ON CRIME, MAY 5, 1983

Mr. Chairman & Members of the Committee:

Thank you very much for the opportunity to testify today with regard to House Bill 2643.

My name is Steven Lubet. I am a professor of Law at Northwestern University in Chicago. Among other courses, I teach a seminar at Northwestern entitled "The Law of International Travel," which covers the subject of international extradition. I have recently authored an article entitled, "Executive Discretion and Judicial Participation in the Extradition of Political Terrorists" which will be published later this month in the Cornell Journal of International Law. This article discusses and critiques the various extradition reform proposals which were introduced in the 97th Congress.

I had the privilege of testifying before this subcommittee last winter with regard to House Bill 5227, the Extradition Reform Act of 1981. Since many of my remarks on that occasion remain relevant to the Bill currently before the committee, I will not rehearse them today. I have also taken the liberty of appending to this testimony the latest page proofs of my forthcoming article. Therefore with your permission, I will limit my remarks today to the following three areas covered by H.R. 2643: (1) the rule of non-inquiry; (2) the definition of a political offense; and (3) the issue of burden of proof.

THE RULE OF NON-INQUIRY

The rule of non-inquiry traditionally has barred courts of extradition from considering such matters as the motive or good faith of the requesting government, or humanitarian considerations which might operate to defeat a facially valid extradition request. These issues have been recognized as important in the consideration of extradition, but have been left to the

discretion of the Secretary of State rather than to that of the courts. This rule is codified by section 3194(e)(4) of H.R. 2643, which provides as follows:

- (A) Any issue as to whether the foreign state is seeking extradition of a person for the purpose of prosecuting or punishing the person because of such person's political opinions, race, religion, or nationality shall be determined by the Secretary of State in the discretion of the Secretary of State.
- (B) Any issue as to whether the extradition of a person to a foreign state would be incompatible with humanitarian considerations shall be determined by the Secretary of State in the discretion of the Secretary of State.

These provisions place great restraints on trial judges in extradition cases. In a country where the citizenry is accustomed to presenting virtually every conflict to some court or another, it seems almost intuitive that a federal judge ought to be able to consider such matters as possible torture or racial discrimination in ruling upon a request for extradition. These issues, without question, go to the very heart of the desirability of extradition. Respect for human rights requires that our country not return fugitives to jurisdictions where the punishment for theft is the loss of a hand or where the charge of an ordinary crime is used as a guise for political persecution. Since our system of justice favors judicial resolution, many commentators and observers believe that the rule of non-inquiry ought to be eliminated, or at least made more flexible, so as to allow the courts to look behind an extradition request and consider the underlying political and social conditions in the requesting country.

I do not share this view. The rule of non-inquiry prohibits the courts from considering precisely those issues which involve the integrity of the requesting government. These issues do not turn on the proof of discrete facts but rather on such inchoate considerations as motive, good faith, and sincerity. These are matters, particularly as they regard a foreign sovereign, which are not easily

justiciable. How does one prove that a foreign government is motivated by a desire for political vengeance, rather than by the desire to punish a common criminal? Is the requesting government benign or cruel, honest or disingenuous, fair or repressive? These questions ultimately lie closer to opinion than to fact.

The abrogation of the rule of non-inquiry will allow, indeed, will require, federal judges in every jurisdiction to use the occasion of an extradition request to place the requesting government on trial. This will result in hearings in which "evidence" is presented and decisions rendered concerning the inner workings of foreign sovereigns. No decision could touch more dramatically upon the conduct of foreign affairs. If nothing else, the need for national uniformity of result counsels against requiring the courts to make these decisions. What could be more disruptive to the conduct of foreign policy than the possibility that different federal judges will reach differing conclusions as to the good faith of the same requesting government. Is it possible that it could be inhumane for a district judge in, say, Los Angeles to return a fugitive to Canada, but that it would be perfectly permissible for a judge in Maine to do the same.

The rule of non-inquiry distinguishes between political crimes and political motives. Thus, the rule allows a district judge to deny extradition because the underlying offense is a political one, but does not allow the judge to look behind the offense and deny extradition on the basis of the requesting government's motive. This is a fine but important distinction. Questions concerning the nature, content, and context of alleged criminal acts are capable of proof through the presentation of litigative facts. Questions concerning the motives of foreign governments, on the other hand, resolve ultimately into political judgments. It is the duty of the executive branch, not the courts, to make political judgments.

It is important to bear in mind that a foreign nation may only request extradition pursuant to a valid treaty. Thus, every extradition case necessarily will involve a treaty which has been negotiated and executed by the President and ratified by a two-thirds majority of the Senate. In other words, a political decision already will have been made concerning the general appropriateness of extradition to the foreign state. The executive and the legislature will have concluded that the government in question is one which affords due process to criminal defendants, does not engage in torture, and is otherwise a reliable treaty partner. Under these circumstances, the decision of a court to deny extradition on the ground that the request is a subtrafuge, or will result in the inhumane treatment of the individual, goes far beyond interpretation of the treaty and the application of facts to its provisions. Rather, such a decision amounts to a repudiation of the underlying basis for the treaty of extradition.

I do not mean to suggest that the existence of an extradition treaty ought to be determinative of the issues covered by the rule of non-inquiry. It is certainly possible, given rapidly changing world conditions, that it would be appropriate to deny extradition even in cases covered by a valid treaty. What I do mean to suggest, however, is that such a decision is inevitably a political one. The Constitution places the conduct of foreign affairs in the hands of the executive, subject to ratification under certain circumstances by the legislature. Thus, if a decision is to be made which repudiates a treaty obligation, it ought to be made by the branch of government which the Constitution entrusts with the responsibility for foreign affairs.

Opponents of the rule of non-inquiry stress that the executive branch may be under great pressure to place political considerations above humanitarian ones. The argument is made that the Secretary of State may be compelled by

reasons of realpolitik to deliver a hapless defendant into the hands of a discriminatory or oppressive regime which happens to be momentarily allied with the interests of the United States. It is suggested, therefore, that the courts, being neutral in such matters, are the appropriate repository for the defense of the rights of such defendants. This argument would have greater weight if it were not for the fact that there is no track record to support it. The rule of non-inquiry has been the settled law in the United States for over sixty years,\* and, accordingly, extraditing courts consistently have deferred to the executive in considering such factors as the political motivation of the requesting state or the treatment which the defendant would receive upon rendition. Presumably then, if the executive branch were inclined to abuse the discretion vested in it by the rule of non-inquiry, this already would have happened. Nonetheless, opponents of the rule of non-inquiry have not, to my knowledge, pointed out a single case in which the executive branch has handed over a fugitive to be subjected to repression or torture. One can only conclude that the executive branch has proven worthy of the trust reposed in it by the rule of non-inquiry and that the benefits of the rule greatly outweigh the limitations that it places on the courts.

#### THE DEFINITION OF A POLITICAL OFFENSE

The political offense exception provides a well recognized exemption from international extradition. Under its terms a fugitive may be insulated from an otherwise valid request for extradition because of the political nature of the crime involved. The rationale for this rule is two-fold. First, it allows the United States to refuse to become involved in the internal political affairs of

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\*See, *In re Lincoln*, 241 U.S. 651 (1916).



another country. I call this aspect of the rule its "neutrality function," as it is intended to safeguard the United States against appearing to favor one contending side or another in a foreign country's struggle for political power. The second aspect of the political offense exception may be called its "fairness function." This function embodies the concept of asylum and recognizes the need to give haven to political dissidents.

House Bill 2643, if enacted, will provide the United States' first legislative definition of the political offense exception. Such a definition is long overdue. Section 3194(e)(2) provides that the political offense exception will never be applied to certain specified offenses such as aircraft hijacking, attacks on diplomats, or the sale of narcotics. These provisions recognize that there are some crimes which are simply unacceptable, and should not be shielded from extradition no matter what their motivation. Section 3194(e)(3) goes on to provide that certain other offenses may not come within the ambit of the political offense exception except in "extraordinary circumstances." These offenses includes homicide, kidnapping, the use of a firearm or explosive, and rape.

The two-tiered approach is a good one. It recognizes the importance that factors such as context and content may play in the determination of a political offense. This approach appropriately sets an outer limit for the application of the exception while preserving flexibility in most cases. I do have some comments and suggestions with regard to the assignment of the various offenses between the two tiers.

The first tier, that is offenses which will never be considered political, is essentially limited to those crimes which are covered by an international convention or a multilateral treaty under which the United States is obliged either to extradite or prosecute a person accused of the specified offense. I

think, therefore, that it would be appropriate to include in this tier those offenses which would constitute a "grave breach" of the humanitarian rules of war as defined by Protocol I in the 1949 Geneva Conventions. These are, by definition, offenses for which individual soldiers may be subjected to trial or extradition. In the words of the International Law Association's Committee on International Terrorism:

"[T]here is no reason in theory or practice why states should be willing to concede to politically motivated foreigners a license to commit atrocities while saddling their own organized armed forces with the restraints contained in the 1949 Geneva Conventions against committing the same atrocities."

The inclusion of such a provision in the first tier would ensure that no person would be able to escape extradition on the ground of political motivation after having committed an act which, if performed by a soldier engaged in an international armed conflict, would subject the soldier to trial or extradition.

A second question which may be raised with regard the offenses enumerated in the first tier regards the inclusion of aircraft hijacking. It is certain that aircraft hijacking is a crime which plagues modern civilization and international commerce. It poses an extraordinary threat to the regularity of international transactions and, even more important, to the safety and security of innocent passengers. Given the frequency with which skyjackers at least profess a political motivation, it is particularly appropriate that this crime should receive enumerated attention in an extradition reform bill.

Nonetheless, it seems equally appropriate to ask whether the crime is so severe that its perpetrators should never be shielded from extradition and therefore be uniformly and inevitably subjected to rendition. Airplane hijacking originated as a form of escape. In many countries where the borders are closed and where immigration is not freely allowed, the commandeering of an aircraft

may be the only form of escape from an oppressive regime. We in the United States characteristically look with favor upon those who take risks to escape from totalitarianism. It is difficult to say that we shall greet as heroes those who crash automobiles through the Berlin wall but that we will return for punishment as criminals those who steal airplanes to fly over it. It certainly bears remembering that the crime which led to the lengthy imprisonment of the Soviet dissidents known as the Leningrad Eight, including Yosef Mendelevich, was conspiracy to hijack an aircraft.

On balance, I believe that the question of aircraft hijacking provides the Congress with the opportunity to avoid allowing hard cases to make bad law. The crime of aircraft hijacking is so serious and so disruptive of public order that it would be unwise to attempt to draft a statute which would distinguish between "good" and "bad" hijacking. Thus, this crime fits the description which the first tier was intended to embody: it is so serious and so dangerous that it may not fall within the political offense exception no matter how praiseworthy the underlying motive. If this result seems harsh, and if it conjures up images of the involuntary return of dissidents to Soviet bloc countries, it is important to bear in mind that the provisions of section 3194(e) apply only to determinations made by the courts. Thus, the exclusion of airplane hijacking from the political offense exception will not be binding upon the Secretary of State. In appropriate circumstances, such perhaps as those the Leningrad Eight, the Secretary of State may still decline to surrender a fugitive charged with hijacking. Since such a declination would have to be based upon policy considerations so strong that they justify contravention of an international norm, it is entirely appropriate that the Secretary of State be the sole repository of this discretion.

As I read the second or "extraordinary circumstances" tier, it is intended to provide the judiciary with greater flexibility than that which was allowed by

House Bill 5227 as it was presented to the 97th Congress. The second tier lists certain crimes which will be presumed non-political. These crimes include such offenses as homicide, kidnapping, rape, and use of firearms or explosives. Under the proposed House Bill 5227 these crimes would have been excluded completely from the political offense exception. The approach of the current bill is preferable, as it allows the court to consider the circumstances and context of the crime, and to rule that the exception applies in appropriate circumstances. In my testimony before this Subcommittee concerning House Bill 5227 I noted that a blanket exclusion of all crimes of violence from the political offense exception could have led to the undesirable result of returning the then-imprisoned Lech Walesa to Poland, should he have succeeded in his escaping to the West while using a firearm in the process. Now under the new provision it would be possible to grant such a fugitive sanctuary from extradition, should the court find that the offense was committed under "extraordinary circumstances." This is obviously a preferable result; the use of a firearm, even the commission of the homicide, is unfortunately a frequent and necessary occurrence in the course of rebellion. These are not crimes which, under international standards, are so heinous, or disruptive as never to be considered political. Indeed, the leading British case on the political offense exception, In Re Castioni,\* involved a homicide by shooting. The thrust of § 3194 (e)(3) appears to be the creation of a presumption that crimes of violence are not political, while allowing for countervailing proof that the circumstances of the crime were such as to warrant asylum.

What remains, then, is to arrive at a definition of the term "extraordinary circumstances." This is not provided by the statute, and, since it is a new

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\*1 Q.B. 149 (1891)

concept, there is similarly no judicial precedent for guidance. Clearly this is a case which calls for the creation of legislative history so that future courts of extradition may know what Congress had in mind when it coined the term. Two types of extraordinary circumstances come to mind. The first would involve situations of necessity, escape, or self-defense. Under this formulation the escaping Lech Walesa or an Afghan partisan actively engaged in resistance might be considered to have used a firearm under extraordinary circumstances. A second type of extraordinary circumstance might be presented by actual civil war. Thus, the use of a firearm on behalf of one contending side or another in an actual armed struggle for power within a state could be viewed as analogous to an international armed conflict under the Geneva Conventions, and therefore be considered to be an extraordinary circumstance. Such a test would bring the Afghan guerrillas within the political offense exception, but would exclude the kidnappings and "knee-cappings" of groups like the Red Brigade.

Finally, I am unable to understand why rape is included as a crime which may be political under extraordinary circumstances. I find it virtually impossible to conceive of a situation where the violation of another human being's physical integrity could be considered sufficiently political so as to shield the act from extradition.

#### BURDEN OF PROOF

The current law concerning the burden of proof in political offense cases is ambiguous. It has been held in some cases that the burden is on the defendant to prove that a particular crime falls within the political offense exception.\* Other courts have concluded that once the exception is raised it is the

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\*See, *Abu Eain v. Wilkes*, 641 F.2d 504 (1981).



government's burden to prove that the crime was not political.\* The Supreme Court has not addressed the issue, and no lower court opinion has fully analyzed all of the problems involved in the issue of burden of proof.

House Bill 2643 promises to resolve the ambiguity by placing the burden of proof on the defendant. Section 3194(b)(2)(C) provides that a court shall not order a person extraditable if the court finds that

The person has established by the preponderance of the evidence that any offense for which such person may be subject to prosecution or punishment if extradited is a political offense.

This provision represents the first legislative articulation of the burden of proof in political offense cases.

It is entirely appropriate that the burden of proof in these cases be placed upon the defendant. The political offense exception is an affirmative defense involving facts which are uniquely within the defendant's control. It introduces a new issue of fact to the trial which is collateral to the request for extradition, and which seeks to avoid an otherwise valid request for extradition. Thus, the defendant is the party who, as a logical and practical matter, ought to bear the burden of establishing facts sufficient to bring the charged conduct within the scope of the political offense exception. This is in accord with the practice of other nations, and is consistent with other American law. In Immigration law, for example, persons who seek political asylum as relief from deportation bear the burden of proving that they will be subjected to persecution if returned to their homeland. Having placed this burden on non-criminals whom we merely seek to deport, it would certainly make no sense to allocate the burden differently in cases where there is reason to believe that the defendant has committed a serious and extraditable crime.

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\*See, *Ramos v. Diaz*, 179 F. Supp. 459 (1959).

In my testimony on House Bill 5227 I urged this subcommittee to adopt the standard of "clear and convincing evidence" in determining the political offense exception. I still hold that view. The preponderance of the evidence standard represents a minimal burden; it requires only that the issue be proven by the greater weight of the evidence, or be shown to be "more probable than not." Paraphrasing the United States Supreme Court in the case of Santosky v. Kramer,\* it is an appropriate standard for the resolution of civil disputes between private parties where society places no particular value or importance on the outcome. It is apparent from the totality of House Bill 2643, however, that we do place importance on the outcome of political offense cases and that the drafters of the bill have concluded that the political offense exception ought only be applied in narrow circumstances. In other words, the presumption is against the defendant who raises the defense. I believe that this ought to be a strong presumption, and one which is measured by an objective standard. A test which only looks at "the greater weight of the evidence" does not meet this requirement.

Finally, I note that the preponderance of the evidence standard is difficult to harmonize with the definitional approach that H.R. 2643 takes to the political offense exception. What can it mean to require a defendant to prove the existence of extraordinary circumstances by a preponderance of the evidence? It seems intellectually inconsistent to say that one can prove that it was "more probable than not" that the circumstances surrounding a crime were extraordinary. Since the standard which will be applied to most political offenses is the extraordinary circumstances test, the most juridically compatible standard of proof would be clear and convincing evidence. It seem unlikely that

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\*455 U.S. 754 (1982).

any sitting judge could conclude that the circumstances of a homicide or violent assault were so extraordinary as to warrant the application of the political offense exception, unless he or she had been presented with clear and convincing evidence to establish that proposition.

#### CONCLUSION

It is my conclusion that House Bill 2643 represents an excellent solution to the many problems posed by extradition reform. It maintains a strong judicial role in the extradition process, while giving the courts sound guidance as to matters of substance and procedure. Although I have a number of suggestions for discrete changes in the bill, my overall opinion is that it is a vast improvement over the present state of the law and that it is by far the best proposal for extradition reform which has been presented before the Congress.

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## ARTICLES

### EXTRADITION REFORM: EXECUTIVE DISCRETION AND JUDICIAL PARTICIPATION IN THE EXTRADITION OF POLITICAL TERRORISTS

*Steven Lubet\**

The unprecedented attention given to three recent cases of international extradition, each involving an incident of terror-violence,<sup>1</sup> has led to the first full-scale legislative evaluation of the

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1. *Abu Eain v. Wilkes*, 641 F.2d 504 (7th Cir. 1981), *aff'g*, *In re Abu Eain*, Magis. No. 79 M 175 (N.D. Ill., opinion filed Dec. 18, 1979), *cert. denied*, 454 U.S. 894 (1981); *In re Mackin*, No. 80 Cr. Misc. 1 (S.D.N.Y., opinion filed August 13), *aff'd*, *United States v. Mackin*, 668 F.2d 122 (2d Cir. 1981); *In re McMullen*, No. 3-78-1899 M.G. (N.D. Cal., Memorandum decision filed May 11, 1979). See *infra* notes 35-42 and 147-49 and accompanying text.

extradition law of the United States since 1882.<sup>2</sup> The cases illustrate the inadequacy of both the substantive and procedural law governing the political offense exception to extradition.<sup>3</sup> Congressional deliberations have resulted in extensive public debate and scholarly analysis of the definition of a political offense and of the process for determining whether political offenders are extraditable.<sup>4</sup>

This article discusses the history and current status of the political offense exception in the extradition law of the United States, highlighting the deficiencies in the antiquated process. The article analyzes the reform proposals which have been presented to Congress and recommends substantive and procedural changes in the law of extradition. The contemporary international environment requires an extradition law that reduces the ability of terrorists to claim the protection of the political offense exception, but which retains the vitality of the concept of political asylum for legitimate dissidents. This article recommends a process that preserves the strengths of the tradition of the United States, and satisfies the requirements of the contemporary environment.

## I

### THE ORIGIN AND FUNCTION OF THE POLITICAL OFFENSE EXCEPTION

The political offense exception to extradition emerged in the nineteenth century.<sup>5</sup> When it first developed, extradition was used

2. See H.R. REP. NO. 627, 97th Cong., 2d Sess. 3, n.3 (1982). Congress has considered three versions of extradition reform: H.R. 6046, 97th Cong., 2d Sess. (1982); S. 1940, 97th Cong., 2d Sess. (1982) and S. 1639, 97th Cong., 1st Sess. (1981). S. 1940 passed the Senate on August 19, 1982. 128 CONG. REC. S. 10884 (daily ed.). The House did not consider it before the end of the 97th Congress, however. The bills have not been reintroduced yet in either house.

3. See *infra* notes 35-42 and accompanying text.

4. See, e.g. *Extradition Act of 1982: Hearings on H.R. 5227 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 97th Cong., 2d Sess. (1982); *Extradition Act of 1981: Hearings on S. 1639 Before the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. (1981); Hannay, *International Terrorism and the Political Offense Exception to Extradition*, 18 COLUM. J. TRANSNAT'L L. 381 (1980); *International Procedures for the Apprehension and Rendition of Fugitive Offenders: A Panel*, 74 AM. SOC'Y INT'L L. PROC. 274 (1980) (remarks by Bassiouni, Kenney and Williams, and discussion); Lubet and Czaczkes, *The Role of the American Judiciary in the Extradition of Political Terrorists*, 71 J. CRIM. L. CRIMINOLOGY 193 (1980).

5. See *Harvard Draft Convention on Extradition*, 29 AM. J. INT'L L. SUPPLEMENTS 1, 107-19 (1935). The "practice of non-extradition of political offenders [in the early part of the 19th century] . . . may be explained by two main factors: (1) the evolution of political institutions following the French Revolution; (2) the growing consciousness of the interdependence of nations following the Industrial Revolution." *Id.* at 108. See also M.R. GARCIA-MORA, *INTERNATIONAL LAW AND ASYLUM AS A HUMAN RIGHT* 73-76 (1956).



as a tool for the apprehension of political dissidents; however, as constitutional government and industry evolved, sovereigns began to accept the legitimacy of political dissent.<sup>6</sup> In 1833 Belgium enacted the first legislation exempting political offenders from extradition;<sup>7</sup> the first treaty containing a political offense exception to extradition was executed between Belgium and France in 1834.<sup>8</sup>

The United States has never enacted a domestic statute embodying the political offense exception, undoubtedly because such legislation was viewed as redundant to the widely accepted principle that extradition could not lie for a political offense.<sup>9</sup> As early as 1853 the United States recognized that political offenders were protected from rendition, notwithstanding the absence of a specific treaty clause or statute.<sup>10</sup>

The political offense exception is now so well accepted in international law that it has become more than simply an optional provision to be found in bilateral treaties. The concept of political asylum is included in the United Nations Declaration of Human Rights,<sup>11</sup>

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6. Before the 19th century, with fragmented medieval dynasties, the extreme hardship associated with the extradition process necessitated limiting its use to the apprehension and punishment of those who threatened the political system. GARCIA-MORA, *supra* note 5, at 73. In the late 18th and early 19th centuries, however, political dissent became acceptable. *Id.* at 73-76; *Harvard Draft Convention on Extradition*, 29 AM. J. INT'L L. SUPPLEMENTS 108-09 (1935). See also Letter from Thomas Jefferson to James Madison (Jan. 30, 1787) ("I hold it, that a little rebellion, now and then, is a good thing, and as necessary in the political world as storms in the physical."); and J.S. MILL, ON LIBERTY 2 (A. Oostell ed. 1947) ("political liberties or rights which it was to be regarded as a breach of duty in the rule to infringe, and which, if he did infringe, specific resistance, or general rebellion, was to be held justifiable.").

7. Laws of 1 October 1833, art. 6 (Belgium).

8. See I.A. SHEARER, EXTRADITION IN INTERNATIONAL LAW 17-19 (1971); M.R. GARCIA-MORA, INTERNATIONAL LAW AND ASYLUM AS HUMAN RIGHT 75,94 (1956) (Article 4 of the Convention on Extradition of November 22, 1834, between France and Belgium provided: "It is expressly stipulated that a foreigner whose extradition has been granted, cannot, in any case, be prosecuted or punished for a political crime antecedent to the extradition or for any act connected with such a crime.") (quoting from A. BILLOT, TRAITÉ DE L'EXTRADITION III (1874)).

9. See 1 J.B. MOORE, EXTRADITION AND INTERSTATE RENDITION §§ 205-218 and 303-326 (1891); 1 L.F.L. OPPENHEIM, INTERNATIONAL LAW §§ 333-337 and 573-579 (McNair ed. 1928); F.T. PIGGOTT, EXTRADITION 44-62 (1910). See also SHEARER, *supra* note 8, at 73-94; *Harvard Draft Convention on Extradition*, 29 AM. J. INT'L L. SUPPLEMENTS 107-119 (1935).

10. *Ex parte Kaine*, 14 F. Cas. 79, 81-82 (C.C.S.D.N.Y. 1853) (No. 7597).

11. The Universal Declaration of Human Rights, G.A. Res. 217(III), U.N. Doc. A/810, at 74 (1948) (3d Sess., 1st Part), provides in Article 14: "1. Everyone has the right to seek and to enjoy in other countries asylum from persecution. 2. This right may not be invoked in the case of prosecution genuinely arising from nonpolitical crimes or from acts contrary to the purposes and principles of the United Nations." The General Assembly voted on each article of the Declaration and on the Declaration as a whole. Article 14 was adopted by 44 votes to six with two abstentions. No roll call was taken for the vote on each article; therefore, there is no record of the members casting negative votes or abstaining. The Declaration as a whole was adopted by 48 votes with eight abstentions. The abstaining members were Byelorussian Soviet Socialist Republic, Czechoslovakia.

and many states protect political offenders from rendition by domestic legislation.<sup>12</sup> Indeed, a form of the political offense exception is contained in the constitutions of Brazil,<sup>13</sup> Mexico,<sup>14</sup> Italy,<sup>15</sup> and Spain.<sup>16</sup> The United States, though lacking a constitutional or statutory provision, has included the political offense exception in each of its 96 treaties of extradition.<sup>17</sup> Given the near universality of the

Poland, Saudi Arabia, Ukrainian Soviet Socialist Republic, Union of South Africa, Union of Soviet Socialist Republics and Yugoslavia. 3(1) U.N. GAOR (183d plen. mtg.) at 933 (1948). For the discussions in the Committee on Social, Humanitarian and Cultural Questions on the provision for asylum of political offenders, see 3(1) U.N. GAOR C. 3 (121st-122nd mtgs.) at 327, U.N. Doc. E/800 (1948). On the communist support for aspects of political asylum see Gold, *Non-extradition for Political Offenses: The Communist Perspective*, 11 HARV. INT'L L.J. 191 (1970).

12. For example, the extradition statute of the Federal Republic of Germany provides in part: "Extradition is not permissible when the act for which extradition is sought is a political one or is connected with a political act in such a way that it prepared, secures, or covers it, or guards against it. Deutsches Auslieferungsgesetz [DAG] § 3(1). Vom. 23. December 1929 Reichsgesetzblatt [RGBL] I 239, as amended by 1974 Bundesgesetzblatt [BGBL] I 469 (W. Ger.).

Similarly, Extradition Act, 1870, 33 & 34 Vict., ch. 52, § 3, of the United Kingdom provides:

A fugitive criminal shall not be surrendered if the offense in respect of which his surrender is demanded is one of a political character, or if he proves to the satisfaction of the police magistrate or the court before whom he is brought on habeas corpus, or to the Secretary of State, that the requisition for his surrender has in fact been made with a view to try or punish him for an offence of a political character.

The Israeli statute on Extradition Law provides at Section 10: "[T]he Court shall not declare a wanted person subject to extradition if it finds that there are reasonable grounds for assuming . . . that the request for extradition aims at prosecuting or punishing him for an offence of a political character, though *prima facie* it is not made in connection with such an offence." Extradition Act, 5714-1954, 8 Laws of the State of Israel 145 (Authorized Translation from the Hebrew, Prepared at the Ministry of Justice).

13. CONSTITUICAO art. 153 (Brazil).

14. CONSTITUCION art. 15 (Mexico).

15. COSTITUZIONE art. 1, app. A (Italy).

16. CONSTITUCION art. 1, para. 3 (Spain).

17. See 18 U.S.C.A. § 3181 (Supp. 1982). The United States has entered into bilateral extradition treaties with the following nations:

Albania	Grenada	Norway
Argentina	Guatemala	Pakistan
Australia	Guyana	Panama
Austria	Haiti	Papua New Guinea
Bahamas	Honduras	Paraguay
Barbados	Hungary	Peru
Belgium	Iceland	Poland
Bolivia	India	Portugal
Brazil	Iraq	Romania
Bulgaria	Ireland	San Marino
Burma	Israel	Seychelles
Canada	Italy	Sierra Leone
Chile	Jamaica	Singapore
Columbia	Japan	Solomon Islands
Congo (Brazzaville)	Kenya	South Africa
Costa Rica	Latvia	Spain
Cuba	Lesotho	Sri Lanka

exemption, it is now possible to speak of an international right to, or at least an international norm of, political asylum.

Two policies underlie the political offense exception. From the perspective of the requested state, the exception permits a sovereign (1) to refuse to become involved in the domestic affairs of another country, and (2) to extend humanitarian relief to political dissidents.<sup>18</sup> These two policies reflect the "neutrality function" and the "fairness function" of the political offense exception.

The neutrality function exists purely for reasons of state. It allows a government to decline to surrender a fugitive in order to avoid embarrassing involvement in the political affairs of another country. This function recognizes that the rebels of today may become the victors of tomorrow and that the government officials of today may become the fugitives of tomorrow.<sup>19</sup> Thus, all other considerations aside, a state may wish to remain aloof from the political turmoil in another country, against the day when such involvement might be seen as sponsorship of one contending side or the other. This aspect of the political offense exception is value free, and may explain why the adoption and acceptance of the exception is not limited to states with democratic governments.<sup>20</sup>

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Cyprus	Liberia	Surinam
Czechoslovakia	Licchtenstein	Swaziland
Denmark	Lithuania	Sweden
Dominican Republic	Luxembourg	Switzerland
Ecuador	Malawi	Tanzania
Egypt	Malaysia	Thailand
El Salvador	Malta	Tonga
Estonia	Mauritius	Trinidad and Tobago
Fiji	Mexico	Turkey
Finland	Monaco	United Arab Republic
France	Nauru	United Kingdom
Gambia	Netherlands	Uruguay
Germany, Federal	New Zealand	Venezuela
Republic of	Nicaragua	Yugoslavia
Ghana	Nigeria	Zambia
Greece		

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18. See *Extradition Act of 1981: Hearings on S. 1639 Before the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 49 (1981) (Testimony of W. Hannay, attorney at law) [hereinafter referred to as *Hearings on S. 1639*].

19. See, e.g., *Jiminez v. Aristeguieta*, 311 F.2d 547 (1962), *aff'd per curiam sub nom. Jiminez v. Hixon*, 314 F.2d 654 (5th Cir.), *cert. denied*, 373 U.S. 914 (1963) (former chief executive of Venezuela).

20. For example, the United States has extradition treaties containing the political offense exception with Albania, Mar. 1, 1933, 49 Stat. 3313, T.S. No. 902; Argentina, Jan. 21, 1972, 23 U.S.T. 3501, T.I.A.S. No. 7510; Bulgaria, Mar. 19, 1924, 43 Stat. 1886, T.S. No. 687; Chile, Apr. 17, 1900, 32 Stat. 1850, T.S. No. 407; Haiti, Aug. 9, 1904, 34 Stat. 2858, T.S. No. 447; Hungary, July 3, 1856, 11 Stat. 691, T.S. No. 9; Iraq, June 7, 1934, 49 Stat. 3380, T.S. No. 907; Poland, Apr. 5, 1935, 46 Stat. 2282, T.S. No. 908; Rumania, July 23, 1924, 44 Stat. 2020, T.S. No. 713; South Africa, Dec. 18, 1947, 2 U.S.T. 884, T.I.A.S. No. 9891; and Yugoslavia, Oct. 25, 1901, 32 Stat. 1890, T.S. No. 406.

The fairness function reflects a principled desire to give haven to political dissidents.<sup>21</sup> This approach necessarily implies a value judgment as to the motives of the fugitive and the nature of the requesting government. It has been argued that the fairness function precludes the return of any rebel to the government against which he has taken up arms, on the theory that he will never receive a fair trial under such circumstances.<sup>22</sup> The courts of the United States have rejected this last theory with regard to extradition requests originating from democratic countries,<sup>23</sup> but otherwise have recognized the validity of the fairness function in evaluating an individual's right to assert the political offense exception in defense of an extradition action.<sup>24</sup>

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In addition, an extradition treaty has been negotiated by the executive authorities of the United States and the Philippines, although it has not yet come before the Senate for approval. See, *U.S. Policy Toward the Philippines, 1981: Hearings Before the Subcomm. on Asian and Pacific Affairs and on Human Rights and International Organizations of the House Comm. on Foreign Affairs, 97th Cong., 1st Sess. 37 (1981)* (statement of C.H. Lande, Professor of Political Science, University of Kansas).

21. See *Hearings on S. 1639, supra* note 18, at 49-50 (testimony of W. Hannay, attorney at law):

As extradition treaties became prevalent in the 19th century, democratic nations undoubtedly found themselves facing the unpleasant task of sending a political dissenter or activist back to a tyrannical regime to stand trial for acts which they did not perceive as "criminal" in any ethical or moral sense. Through the mechanism of the "political offense" exception, a conflict between the affirmative obligation to extradite under a treaty and the desire to grant political asylum was avoided. The fugitive newspaper editor charged with sedition or the fugitive political candidate charged with treason merely for expressing their opinions could be sheltered from extradition for these "pure" political offenses, the sort of offense directly implicating cherished democratic values. In addition, the fugitive dissident charged with criminal trespass during a protest or rally could be sheltered for this "relative" political offense, the sort of offense that smacks of a "trumped up" charge.

On pure and relative political offenses, see *infra* notes 26-28 and accompanying text. On the historical perspective, see *supra* note 6 and accompanying text, and M.R. GARCIA-MORA, *INTERNATIONAL LAW AND ASYLUM AS A HUMAN RIGHT* 73-76 (1956).

22. See, e.g., GARCIA-MORA, *supra* note 21, at 75:

The *raison d'être* of the [political offense exception] can be found in the well-founded apprehension that to surrender unsuccessful rebels to the demanding state would surely amount to delivering them to their summary execution, or, in any event, to the risk of being tried and punished by a justice colored by political passion.

See also 2 C.C. HYDE, *INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES* 1019 (1951) (discussing the "reluctance to surrender a fugitive who might be exposed to summary and arbitrary treatment if restored to the clutches of the demanding government.").

23. See generally *Abu Eain v. Wilkes*, 641 F.2d 504 (7th Cir.), *cert. denied*, 454 U.S. 894 (1981). But the State Department recognized the problem of a fair trial in Mexico when it refused to extradite General Huertas in 1915. See GARCIA-MORA, *supra* note 21, at 95 n.17.

24. See, e.g., *In re Mackin*, No. 80 Cr. Misc. 1 (S.D.N.Y., opinion filed August 13), *aff'd*, *United States v. Mackin*, 668 F.2d 122 (2d Cir. 1981); *In re McMullen*, No. 3-78-1899 M.G. (N.D. Cal., memorandum decision filed May 11, 1979). But cf. *Hearings on S. 1639, supra* note 18, at 48-49 (testimony of W. Hannay, attorney at law) (emphasizing the



The enlightened statesmen who originated the exception left the term "political offense" undefined in order to encompass a broad range of protected activity.<sup>25</sup> Two categories of political offenses evolved, however, that aided in the conceptualization of the exception: "pure" and "relative" political offenses.<sup>26</sup> The purely political offenses are never extraditable and are limited to crimes such as treason, sedition and espionage, which comprise acts directed against the state.<sup>27</sup> The concept of a relative political offense provides protection for a far greater range of activity; common crimes may not be extraditable if committed in connection with a political act. Thus, a homicide committed in the course of a general uprising may be non-extraditable if a sufficient nexus exists between the crime and the political event.<sup>28</sup>

In recent times, however, the philosophic concept of broad protection for political offenders has eroded in view of the phenomenon of terrorism. The nobility of asylum, and even the desirability of neutrality, necessarily must pale when we realize that the exemption has been invoked on behalf of men like Abu Daoud, the mastermind of the massacre at the Munich Olympics.<sup>29</sup> Thus, the imprecision which was adequate in simpler times, now should give way to a more careful definition of "political offense." The definition must combine the breadth necessary to protect legitimate dissidents with the stringency sufficient to exclude those whose chosen form of expression is to engage in wanton violence. The word "political" has different meanings in different contexts, and a nation should be under no legal or moral obligation to shelter an international fugitive sim-

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lack of substantive rights on the part of the accused to assert the political offense exception).

25. Sir Charles Russell, Q.C., found that the British legislature "purposely abstained from attempting to give an exhaustive definition" to the words "offence of a political character" in Extradition Act, 1870, 33 & 34 Vict., ch. 52. *In re Castioni*, [1891] 1 Q.B. 149, 153.

26. See, e.g., *In re Castioni*, *supra* note 25, at 152-68; *In re Ezeta*, 62 F. 972, 997-1004 (N.D. Cal. 1894); and GARCIA-MORA, *supra* note 21, at 76-82.

27. See 6 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 800 (1968); and Garcia-Mora, *The Nature of Political Offenses: A Knotty Problem of Extradition Law*, 48 VA. L. REV. 1226, 1230-39 (1962).

28. See Garcia-Mora, *supra* note 27, at 1239-56; and *In re Ezeta*, *supra* note 26, at 1000-04.

29. See Judgment of Jan. 11, 1977, Chambre d'Accusation de la Cour d'appel, Paris (complete French text on file at the offices of the Cornell International Law Journal); and the following articles in N.Y. Times: Jan. 10, 1977, at A1, col. 1; Jan. 11, 1977, at A4, col. 3; Jan. 12, 1977, at A1, col. 1; Jan. 13, 1977, at A1, col. 1; Jan. 14, 1977, at A1, col. 4. See also, B.H. WESTON AND A.A. D'AMATO, INTERNATIONAL LAW AND WORLD ORDER 492 (1980); Note, *Bringing the Terrorist to Justice: A Domestic Law Approach*, 11 CORNELL INT'L L.J. 71 (1978); and Note, *The Abu Daoud Affair*, 11 J. INT'L L. & ECON. 539 (1977).



ply because he claims a revolutionary motive for his crime.<sup>30</sup>

The extradition law of the United States essentially ceased developing at the turn of the century;<sup>31</sup> the extradition process is governed by a statute which has not been revised substantially since 1882.<sup>32</sup> The United States courts considering the political offense exception have adhered to a substantive test adopted in 1896.<sup>33</sup> Thus, the United States has never modified the extradition process to take into account the changes in the modern world. International crime and violence exist today in a form which was unimaginable even one generation ago.<sup>34</sup> It is ironic that United States extradition law should attempt to cope with modern terrorism through legal tests and procedures which predate the advent of air travel, guerilla warfare and urban revolution. It is as though the United States had set out to apprehend jet-age terrorists through the use of devices that were developed in the era of the horse and buggy.

The inadequacy of the extradition process was underlined sharply when three recent cases brought the question of political terrorism into United States courts. In two of these cases, *In Re McMullen*<sup>35</sup> and *In Re Mackin*,<sup>36</sup> the United States was unable to effectuate the extradition to Great Britain of Provisional Irish Republican Army gunmen, because the courts found that the offenses charged were "political" in that they had been directed at British soldiers.<sup>37</sup> In the third case, *In Re Abu Eain*,<sup>38</sup> the defendant was extradited successfully to Israel to stand trial for a marketplace

30. See *Hearings on S. 1639*, *supra* note 18, at 48-51 (testimony of W. Hannay, attorney at law).

31. See *supra* notes 5-10 and accompanying text; *In re Castioni*, [1891] 1 Q.B. 149; Extradition Act, 1870, 33 & 34 Vict., ch. 52 (United Kingdom); M.R. GARCIA-MORA, INTERNATIONAL LAW AND ASYLUM AS A HUMAN RIGHT 73-76 (1956); *Harvard Draft Convention on Extradition*, 29 AM. J. INT'L L. SUPPLEMENTS 108-09 (1935).

32. See 18 U.S.C. § 3184 (1976).

33. See *Ornelas v. Ruiz*, 161 U.S. 502 (1896). The test was adopted from the British case, *In re Castioni*, [1891] 1 Q.B. 149. See *infra* notes 98-99 and accompanying text.

34. See generally *An Act to Combat International Terrorism: Hearings on S. 2236 Before the Senate Comm. on Governmental Affairs*, 95th Cong., 2d Sess. (1978).

35. *In re McMullen*, No. 3-78-1899 M.G. (N.D. Cal., memorandum decision filed May 11, 1979), reprinted in *Hearings on S. 1639*, *supra* note 18, at 294.

36. *In re Mackin*, No. 80 Cr. Misc. 1 (S.D.N.Y., opinion filed August 13), *aff'd*, *United States v. Mackin*, 668 F.2d 122 (2d Cir. 1981) (magistrate's opinion reprinted in *Hearings on S. 1639*, *supra* note 18, at 140).

37. The *McMullen* court found that the Provisional Irish Republican Army (PIRA) had been a legitimate political force in Ireland since 1970, that McMullen was a member of the PIRA and that British Army barracks were prime targets for the PIRA. *In re McMullen*, *supra* note 35, at 6; *Hearings on S. 1639*, *supra* note 18, at 294-95.

The *Mackin* court found that the crime charged was "substantially linked to the traditional goal and strategy of the IRA and the PIRA." *In re Mackin*, *supra* note 36, at 98; *Hearings on S. 1639*, *supra* note 18, at 7.

38. *In re Abu Eain*, Magis. No. 79 M 175 (N.D. Ill., opinion filed Dec. 18, 1979), *aff'd*, *Abu Eain v. Wilkes*, 641 F.2d 504 (7th Cir.), *cert. denied*, 454 U.S. 894 (1981).

bombing,<sup>39</sup> but only after a two year legal battle over the applicability of the political offense exception.<sup>40</sup>

These cases created substantial concern in the executive branch of the federal government. The inability of the United States to extradite McMullen and Mackin for crimes of which there was substantial evidence of guilt<sup>41</sup> was perceived as damaging to the diplomatic relationship between the United States and the United Kingdom.<sup>42</sup> The *Abu Eain* case, although ultimately satisfactory to the government in its result, was marked by delay, uncertainty, and controversy due to imprecision in the extradition law.<sup>43</sup>

The United States judicial system was confronted three times in short succession with the problem of transnational terrorism. On each occasion, the process of applying the political offense exception was found to be lacking as a consequence of its antiquated framework. The courts found that they had no fixed procedure for implementing the political offense exception<sup>44</sup> and no reliable definition of its scope.<sup>45</sup> Furthermore, the judiciary and the executive, based upon ambiguities in the treaty law, were in complete disagreement as to the jurisdiction of the courts even to entertain the political offense question.<sup>46</sup>

39. *Eain v. Wilkes*, 641 F.2d 504, 507 (7th Cir. 1981).

40. After a federal magistrate determined on Dec. 18, 1979, that Abu Eain should be extradited to Israel, Eain sought a Writ of Habeas Corpus from a district court. The court denied the writ and the defendant appealed. The Seventh Circuit Court of Appeals affirmed the denial in April 1981. Eain then sought a Writ of Certiorari in the Supreme Court, which was denied on October 13, 1981, nearly twenty-three months after the original case began. See *supra* note 39.

41. Probable cause to believe that the Defendant committed an offense was found by the presiding magistrates in both cases. See *In re McMullen*, *supra* note 35, and *In re Mackin*, *supra* note 36.

42. *Hearings on S. 1639*, *supra* note 18, at 43 (testimony of W. Hannay, attorney at law).

43. See *supra* note 40.

44. See Lubet and Czaczkas, *The Role of the American Judiciary in the Extradition of Political Terrorists*, 71 J. Crim. L. & Criminology 193, 206 (1980).

45. See *Hearings on S. 1639*, *supra* note 18, at 50 (testimony of W. Hannay, attorney at law). Hannay states that the "circumstances in which a state should refuse to cooperate with injustice by sending a dissident back for certain persecution or refuse to allow the mechanism of extradition to be used for mere vengeance simply cannot be defined." *Id.* He further states that "[t]here is no test or rule which meaningfully defines a 'political offense,'" *id.* at 57 (emphasis in original).

46. The United States—United Kingdom Extradition Treaty provides: "Extradition shall not be granted if . . . the offense for which extradition is requested is regarded by the requested party as one of a political character." June 8, 1972, art. 5(1) (c)(1), 28 U. S. T. 22F, T.I.A.S. No. 8468 (Emphasis added). In the *Mackin* case the government argued that "requested party" meant the executive department and not the courts. See Brief for Appellant at 28, *United States v. Mackin*, 668 F.2d 122 (2d Cir. 1981), reprinted in *Hearings on S. 1639*, *supra* note 18, at 241, 274. The court held this interpretation to be incorrect, based on the ambiguity of the phrase "requested party" and the fact that many other United States treaties specifically provide that the judiciary shall make decisions con-

The situation clearly called for reform, and the federal executive responded by proposing broad revisions of United States extradition law.<sup>47</sup> The first proposal came in the form of a draft Extradition Act of 1981,<sup>48</sup> which was prepared jointly by the Department of State, the Department of Justice and the Senate Judiciary Committee.<sup>49</sup> This bill addressed numerous procedural and technical shortcomings in the law, but it was clear to most observers that the primary impetus for reform came from dissatisfaction with the results in the *Mackin* and *McMullen* cases.<sup>50</sup> The process advocated by the executive branch spawned alternative reform proposals. Debate centered around the definition of a political offense, the procedure and allocation of burden of proof in the extradition process, and the appropriate roles of the judiciary and executive in the determination of the extradition question. Before discussing this and subsequent proposals for extradition reform, the following section presents an overview of the current extradition law of the United States.

## II

### CONTEMPORARY EXTRADITION LAW OF THE UNITED STATES

#### A. THE EXTRADITION PROCESS

International extradition is controlled by federal statute.<sup>51</sup> A foreign state may invoke the process only if there is a treaty in force between the United States and the requesting country.<sup>52</sup> An author-

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cerning the political offense exception. *United States v. Mackin*, 668 F.2d 122, 132-35 (2d. Cir. 1981).

47. See H.R. REP. NO. 627, 97th Cong., 2d Sess. 2 (1982); and *HEARINGS ON S.1639*, *supra* note 18, at 14-19.

48. § 1639, 97th Cong., 1st Sess. (1981).

49. See 127 CONG. REC. S9952 (daily ed. Sept. 18, 1981) (statement of Sen. Thurmond).

50. See, e.g., 127 CONG. REC. S9956, S9959 n. 61 (daily ed. Sept. 18, 1981) (Memorandum on Extradition Legislation). See also *Hearings on S. 1639*, *supra* note 18, at 25 (testimony of W. Hannay, attorney at law). Hannay cites the decisions in *McMullen*, *supra* note 35, and *In re Mackin*, *supra* note 36, as support for removing the jurisdiction of the courts to decide the applicability of the political offense exception, *id.* at 25-27. Hannay also states that the purpose of S.1639, *supra* note 48, is to correct a fundamental flaw in extradition procedure revealed by those cases. *Hearings on S.1639*, *supra* note 18, at 39.

51. See 18 U.S.C. §§ 3181-3195 (1976).

52. See 18 U.S.C. §§ 3181, 3184 (1976); *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 7-13 (1936); *Factor v. Laubheimer*, 290 U.S. 276, 287 (1933); *United States v. Rauscher*, 119 U.S. 407, 412-14 (1886); *Gallina v. Fraser*, 278 F.2d 77, 78 (2d Cir. 1960), *cert. denied*, 364 U.S. 851 (1961); *Argento v. Horn*, 241 F.2d 258, 259-61 (6th Cir.), *cert. denied*, 355 U.S. 818 (1957); *Chandler v. United States*, 171 F.2d 921, 935-36 (1st Cir.), *cert. denied*, 336 U.S. 918 (1948); *Ex parte McCabe*, 46 F. 363 (W.D. Tex. 1891); *Ramos v. Diaz*, 179 F. Supp. 459, 460-61 (S.D. Fla. 1959). But see *Evans, Legal Bases of Extradition in the United States*, 16 N.Y.L. FORUM 525, 528 (1970):

ized representative of the requesting country<sup>53</sup> initiates the process by filing a verified complaint charging that a person has committed an extraditable offense within the jurisdiction of the requesting government.<sup>54</sup> No formal diplomatic request is required prior to the filing of the complaint,<sup>55</sup> but the foreign government may supplement the complaint by submitting a requisition to the Secretary of State at any time during the proceeding.<sup>56</sup>

While current law allows an extradition complaint to be filed in any federal or state court if the fugitive is found within its jurisdiction,<sup>57</sup> the consistent practice is to conduct these proceedings in the Federal Courts.<sup>58</sup> Similarly, although the statute authorizes a hearing to be held before any federal district court judge or authorized magistrate,<sup>59</sup> recent cases almost invariably have been referred to magistrates<sup>60</sup>—the lowest ranking officers in the federal judiciary.<sup>61</sup>

The role of the court of extradition is to determine whether there is sufficient evidence to warrant the return of the fugitive to the requesting country.<sup>62</sup> The accused is extraditable only if the requesting country establishes that a valid treaty is in effect,<sup>63</sup> that the person named in the complaint or requisition is the same individual who is before the court,<sup>64</sup> and that the acts charged in the complaint

The *Arguelles* case is apparently the sole exception of record to the rule that the United States may extradite a fugitive only in pursuance of treaty terms. Here, the accused [Don Jose Augustin], a Spanish subject charged with engaging in the slave trade, was surrendered to Spanish authorities in 1864 under summary circumstances as an act of comity by Presidential Order and returned. The incident provoked considerable criticism in Congress.

(citing 1 J.B. Moore, EXTRADITION AND INTERSTATE RENDITION § 27 (1891)). According to Evans, *supra* at 529, "[t]hat the instance is *sui generis* proves the rule as far as American extradition practice is concerned."

53. Although the representative often will be a consul or diplomatic officer, it is only necessary that the person filing the complaint have authorization from the requesting country. This necessitates the court's determination of the legitimacy of the authorization. See *United States ex rel. Caputo v. Kelly*, 92 F.2d 603, *cert. denied*, 303 U.S. 635 (1937).

54. See *Hearings on S. 1639, supra* note 18, at 320 (memorandum on Extradition Legislation, Prepared by the Staff of the Committee on the Judiciary, U.S. Senate, in Cooperation with the Departments of State and Justice).

55. *Id.* See also *United States ex rel. Caputo v. Kelly, supra* note 53.

56. *Id.*

57. See 18 U.S.C. § 3184 (1976); and *supra* note 54.

58. See *supra* note 54.

59. See 18 U.S.C. § 3184 (1976).

60. See cases cited in *supra* note 1.

61. See *United States Magistrates*, 28 U.S.C. §§ 631-639 (1976 & Supp. V 1982).

62. See, e.g., *Benson v. MacMahon*, 127 U.S. 457, 460-63 (1888); and *Peroff v. Hylton*, 542 F.2d 1247, 1249 (4th Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977).

63. See *Ivanecic v. Artukovic*, 211 F.2d 565, 566 (9th Cir.), *cert. denied*, 348 U.S. 818 (1954). See also Note, *United States Extradition Procedures*, 16 N.Y.L. FORUM 420, 441 (1970); and cases cited in *supra* note 52.

64. See, e.g., *Benson v. MacMahon, supra* note 62.



constitute a crime in both the requesting country and the United States.<sup>65</sup> Finally, the court must determine whether there is sufficient proof that an offense has actually occurred.<sup>66</sup> This final requirement generally is satisfied by a showing of "probable cause" to believe that the accused committed the acts charged,<sup>67</sup> that being the standard for commitment for trial under the Federal Rules of Criminal Procedure.<sup>68</sup>

Because an extradition hearing is not a plenary proceeding involving the guilt or innocence of the accused, wide latitude is given with regard to the production and admissibility of evidence. The Federal Rules of Evidence need not apply, and hearsay is admitted freely in the form of affidavits, depositions or other pertinent documents,<sup>69</sup> subject only to a requirement of authentication.<sup>70</sup> The requesting country need not produce witnesses.<sup>71</sup>

The defendant's right to present evidence is limited to that

65. *Id.*; and *Freedman v. United States*, 437 F. Supp. 1252, 1263 (N.D. Ga. 1977). See also I.A. SHEARER, EXTRADITION IN INTERNATIONAL LAW 137-41 (1971); and 6 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 727, 773-79 (1968).

66. See, e.g., *Pettit v. Walshe*, 194 U.S. 205 (1904); *Benson v. MacMahon*, *supra* note 62; *O'Brien v. Rozman*, 554 F.2d 780 (6th Cir. 1977); *Peroff v. Hylton*, *supra* note 62; *United States ex rel. Rauch v. Stockinger*, 170 F. Supp. 506 (E.D.N.Y. 1959), *aff'd* 269 F.2d 681 (2d Cir. 1959), *cert. denied*, 361 U.S. 913 (1959); *United States ex rel. LoPizzo v. Mathues*, 36 F.2d 565 (3rd Cir. 1929).

67. *Id.* See also *Brauch v. Raiche*, 618 F.2d 843, 847 (1st Cir. 1980); *Greci v. Birknes*, 52 F.2d 956, 958 (1st Cir. 1976); *Sindona v. Grant*, 461 F. Supp. 199, 204 (S.D.N.Y. 1978); *Application of D'Amico*, 185 F. Supp. 925, 927 (S.D.N.Y. 1960), *appeal dismissed sub nom. United States ex rel. D'Amico v. Bishop*, 286 F.2d 320 (2d Cir. 1961), *cert. denied*, 366 U.S. 963 (1962).

68. FED. R. CRIM. P. 5.1(a) provides:

Probable Cause Finding. If from the evidence it appears that there is probable cause to believe that an offense has been committed and that the defendant committed it, the federal magistrate shall forthwith hold him to answer in district court. The finding of probable cause may be based upon hearsay evidence in whole or in part. The defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. Objections to evidence on the ground that it was acquired by unlawful means are not properly made at the preliminary examination. Motions to suppress must be made to the trial court as provided in Rule 12.

69. See *supra* note 68; *Vollins v. Loisel*, 259 U.S. 309, 317 (1922); *Bingham v. Bradley*, 241 U.S. 511, 517 (1916); *O'Brien v. Rozman*, 554 F.2d 780 (6th Cir. 1977); *Sayne v. Shipley*, 418 F.2d 679, 685 (5th Cir. 1969), *cert. denied*, 398 U.S. 903 (1970); and *In re David*, 395 F. Supp. 803, 807 (E.D. Ill. 1975).

70. See 18 U.S.C. § 3190 (1976):

Depositions, warrants, or other papers or copies thereof offered in evidence upon the hearing of any extradition case shall be received and admitted as evidence on such hearing for all the purposes of such hearing if they shall be properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped, and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that the same, so offered, are authenticated in the manner required.

71. *Id.*



which tends either to explain the circumstances of the offense,<sup>72</sup> or to show that he is not the actual person sought by the requesting country.<sup>73</sup> The defendant may not present evidence which is generally exculpatory or which merely contradicts or challenges the veracity of the prosecution's case,<sup>74</sup> since such evidence would have no bearing on the issue of probable cause and its admission would transform the proceeding into a trial on the merits.<sup>75</sup>

The decision of the court of extradition is final and is not subject to direct appeal to a higher court.<sup>76</sup> Although there is authority to the effect that the requesting country may, following an adverse decision, refile its request before a different trial court,<sup>77</sup> this route adds delay, expense and complication to the process, but does not bring the case before a higher court for the correction of judicial errors.<sup>78</sup> As a practical matter, a magistrate's decision against extradition ultimately may terminate the proceeding with no opportunity for meaningful review.<sup>79</sup>

72. See *Collins v. Loisel*, 259 U.S. 309, 315-16 (1922); *Charlton v. Kelly*, 229 U.S. 447, 462 (1938); Application of D'Amico, *supra* note 67, at 929-30.

73. See *Benson v. MacMahon*, *supra* note 62; and *Whiteman*, *supra* note 65, at 998-99.

74. See *Collins v. Loisel*, *supra* note 72, at 315-16; *Shapiro v. Ferrandina*, 478 F.2d 894, 900-02 (2d Cir. 1973), *cert. dismissed*, 414 U.S. 884 (1974); and *Sindona v. Grant*, *supra* note 48, at 204-05. In *Collins* the Court noted that to allow the accused to present exculpatory evidence:

would give him the option of insisting upon a full hearing and trial of his case here; and that might compel the demanding government to produce all its evidence here, both direct and rebutting, in order to meet the defense thus gathered from every quarter. The result would be that the foreign government, though entitled by the terms of the treaty to the extradition of the accused for the purpose of a trial where the crime was committed, would be compelled to go into a full trial on the merits in a foreign country, under all the disadvantages of such a situation, and could not obtain extradition until after it had procured a conviction of the accused upon a full and substantial trial here. This would be in plain contravention of the intent and meaning of the extradition treaties.

259 U.S. at 316 (quoting from *In re Wadge*, 15 F. 864, 866 (S.D.N.Y.), *aff'd*, 16 F. 332 (2d Cir. 1883)).

75. See *Collins v. Loisel*, *supra* notes 72 and 74; *Charlton v. Kelly*, 229 U.S. 447, 461 (1913); *Shapiro v. Ferrandina*, 478 F.2d 894, 900-02 (2d Cir. 1973); *Sayne v. Shipley*, 418 F.2d 679, 685 (5th Cir. 1969); *First National City Bank of New York v. Aristequieta*, 287 F.2d 219, 227 (2d Cir. 1960); *Desmond v. Eggers*, 18 F.2d 503, 505-06 (9th Cir. 1927); *Matter of Sindona*, 450 F. Supp. 672, 685-92 (S.D.N.Y. 1978); *Freedman v. United States*, 437 F. Supp. 1252, 1265 (N.D. Ga. 1977).

76. See *United States v. Mackin*, 668 F.2d 122, 125-30 (2d Cir. 1981).

77. See *Id.*, at 128; *Hooker v. Klein*, 573 F.2d 1360, 1365-66 (9th Cir.), *cert. denied*, 439 U.S. 932 (1978); *In re Gonzalez*, 217 F. Supp. 717, 720 (S.D.N.Y. 1963); and *Ex parte Schorer*, 195 F. 334, 337-38 (E.D. Wis. 1912). See also 2 M. BASSIOUNI AND V. NANDA, A TREATISE ON INTERNATIONAL CRIMINAL LAW 367-70 (1973).

78. See *Collins v. Loisel*, 259 U.S. 309 (1922); *Hooker v. Klein*, *supra* note 77; *In re Kelly*, 26 F. 852 (8th Cir. 1886); *In re Gonzalez*, *supra* note 77; and *Ex parte Schorer*, *supra* note 77.

79. See *Hearings on S. 1639*, *supra* note 18, at 6 (statement of M. Abbell, Director, Office of International Affairs, Criminal Division, Department of Justice); at 10 (state-

The defendant similarly is precluded from taking a direct appeal from an unfavorable decision, but may seek collateral relief by filing a petition for a Writ of Habeas Corpus.<sup>80</sup> Although such review is limited more than a direct appeal is,<sup>81</sup> it does provide the defendant with a vehicle for the correction of error that is unavailable to the government. The denial of a Writ of Habeas Corpus is appealable to the higher federal courts.<sup>82</sup>

If the court ultimately authorizes extradition, the Department of State must decide independently whether to deliver the accused to the requesting government.<sup>83</sup> The Secretary of State does not make this decision until the completion of all judicial proceedings,<sup>84</sup> but has broad discretion to deny extradition based upon the executive's view of the facts and interpretation of the treaty.<sup>85</sup> The Department of State generally conducts a de novo examination of the issues and court proceedings, but is not bound by the judicial record.<sup>86</sup> The secretary may consider such additional factors as competing requests from different countries, humanitarian considerations, or public policy with respect to international relations.<sup>87</sup>

This general procedure, although unnecessarily circuitous, may be adequate to deal with ordinary cases of extradition for criminal behavior. Once the political offense exception is raised, however, the shortcomings of the system become apparent.

## B. THE POLITICAL OFFENSE EXCEPTION

As with the general procedure, the court initially determines the applicability of the political offense exception. If the court decides in favor of the extradition request, the Secretary of State may then

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ment of D. McGovern, Deputy Legal Advisor, Department of State); at 33 (statement of W. Hannay, attorney at law).

80. See 28 U.S.C. § 2241 (1976).

81. See, e.g., *Fernandez v. Phillips*, 268 U.S. 311, 312-13 (1925); *Garcia-Guillern v. United States*, 450 F.2d 1189, 1191-92 (5th Cir. 1971). See generally 1 J.B. MOORE, EXTRADITION AND INTERSTATE RENDITION §§ 350-358 (1891).

82. See *United States v. Mackin*, 668 F.2d 122, 128 (2d Cir. 1981). See generally J.B. MOORE, *supra* note 81.

83. See 18 U.S.C. § 3186 (1976):

"The Secretary of State may order the person committed under Sections 3184 or 3185 of this title to be delivered to any authorized agent of such foreign government to be tried for the offense of which charged."

84. See 4 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW § 334 (1944) (citing a memorandum from counselor Anderson of the Department of State to Secretary of State Knox, February 1912, Department of State file 211.42R67116).

85. See Note, *Executive Discretion in Extradition*, 62 COLUM. L. REV. 1313, 1323 (1962); G. HACKWORTH, *supra* note 84, at § 334.

86. *Id.*

87. See *Hearings on S. 1639*, *supra* note 18, at 133-39 (Department of State Memorandum of Decision in the case of the Request by the State of Israel for the Extradition of Ziyad Abu Eain).

review the determination;<sup>88</sup> however, if the magistrate determines that the political offense exception obtains, then extradition is denied and the requesting country is foreclosed from pursuing an appeal.<sup>89</sup> Thus, the lowest ranking officer in the federal judiciary is empowered to make a decision which is binding upon the conduct of United States foreign affairs and immune from review by a higher court.

This odd rule appears to have arisen virtually by accident,<sup>90</sup> but it is unquestionably the current law in the United States.<sup>91</sup> The origin of the rule of non-appealability lies in the relationship between extradition and domestic criminal procedure. Extradition proceedings are preliminary in nature and are analogous to the preliminary hearing in a criminal case.<sup>92</sup> Since the general standard of proof is only "probable cause," the ruling is not deemed a final one and is not given the effect of *res judicata*.<sup>93</sup> Consequently, although the requesting government is free to refile its complaint before a different magistrate, no appeal may be taken. This approach corresponds directly to the Federal Rules of Criminal Procedure,<sup>94</sup> and it is certainly adequate to deal with the "criminal law" aspects of extradition which are preliminary to the ultimate trial on guilt or innocence.

The magistrate's ruling on the political offense exception, however, is the ultimate decision on that issue. The magistrate makes

88. See generally *United States v. Mackin*, 668 F.2d 122 (2d Cir. 1981).

89. After careful review of the legislative and judicial history of current United States extradition law, Judge Friendly concluded, "we think it clear that no appeal lies under 28 U.S.C. § 1291 from the Magistrate's decision here." *United States v. Mackin*, *supra* note 88, at 130.

90. The non-appealability of orders granting or denying extradition requests is generally believed to have originated with *In re Metzger*, 46 U.S. (5 How.) 176 (1847). The case was decided by a district judge in his chambers, and it was held that the law made no provision for review of the special authority exercised by a judge, not sitting in court. Subsequently, a new extradition law was passed, that law was the predecessor to the current extradition law of the United States. Neither the new law nor its legislative history, however, shows any intention to alter the *Metzger* decision with respect to reviewability, and the doctrine of non-appealability of judicial extradition decision became entrenched in United States law. See *United States v. Mackin*, *supra* note 88, at 125.

91. See *supra* note 60 and accompanying text. But see *supra* notes 76-82 and accompanying text (the defendant may file a petition for Writ of Habeas Corpus and the requesting state may refile its request before a different court).

92. See *Charlton v. Kelly*, 229 U.S. 447 (1913); and *Benson v. MacMahon*, 127 U.S. 457 (1888).

93. See *Collins v. Loisel*, 259 U.S. 309 (1922); *United States v. Mackin*, *supra* note 88, at 128; *Hooker v. Klein*, 573 F.2d 1360, 1366-68 (9th Cir.), *cert. denied*, 439 U.S. 932 (1978); *In re Gonzalez*, 217 F. Supp. 717 (S.D.N.Y. 1963); and *Ex parte Schorer*, 195 F. 334 (E.D. Wis. 1912).

94. *Fed. R. Crim. P.* 5.1(6) provides:

Discharge of Defendant: If from the evidence it appears that there is no probable cause to believe that an Offense has been committed or that the defendant committed it, the federal magistrate shall dismiss the complaint and discharge the defendant. The discharge of the defendant shall not preclude the government from instituting a subsequent prosecution for the same offense.

findings of fact and conclusions of law which are not preliminary to those of any other forum; the standard of proof employed is at least the "preponderance of the evidence" test rather than merely a probable cause standard.<sup>95</sup> The magistrate's hearing on the political offense exception is nothing less than a full-scale trial on that issue. The decision is non-appealable only because of its role in the extradition process, but the policy reasons precluding the appeal of preliminary evidentiary findings simply do not apply to the political offense question. It can only be seen as a historical accident that the two aspects of extradition—proof of the crime versus the political nature of the offense—have not been separated procedurally so as to allow direct appeal of the political offense decision.<sup>96</sup>

The difficulty created by the lack of appellate review is compounded by the inadequate substantive and procedural guidelines available to federal magistrates. The United States cases apply the outmoded "incidence test" as the substantive rule governing the political offense exception.<sup>97</sup> In addition, the current law defines neither the party on whom the burden of proof rests nor what standard of proof that must be met in order for the party with the burden to prevail.

The "incidence test," first enunciated in 1891 in the British case *In re Castioni*,<sup>98</sup> provides that a crime is not subject to extradition if it was committed in furtherance of a political rising or disturbance.<sup>99</sup> This emphasis on the existence of a rising or rebellion has resulted in a rule which is both under-inclusive and over-inclusive. The tradi-

95. See Lubet and Czaczkas, *The Role of the American Judiciary in the Extradition of Political Terrorists*, 71 J. CRIM. L. & CRIMINOLOGY 193, 208-09 (1980). See also *In re Gonzalez*, 217 F. Supp. 717, 719-20 (S.D.N.Y. 1963); and *In re Abu Eain*, Magis. No. 79 M 175, at 19-21 (N.D. Ill., opinion filed Dec. 18, 1979), *cert. denied*, 454 U.S. 894 (1981).

96. In *United States v. Mackin*, *supra* note 88, at 129, the United States government sought to appeal the Magistrate's decision, which held that Mackin's offense was of a political nature and therefore non-extraditable. The court rejected the contention of the government, noting that "when Congress has desired to permit an appeal from a decision of a magistrate directly to a court of appeals, it has said so."

97. See, e.g., *Orrclas v. Ruiz*, 161 U.S. 502, 509 (1896); *Abu Eain v. Wilkes*, 641 F.2d 504, 518-23 (7th Cir. 1981), *cert. denied*, 454 U.S. 894 (1981); *United States v. Mackin*, *supra* note 88, at 130-37; *Peroff v. Hylton*, 542 F.2d 1247, 1249 (4th Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977); *Garcia-Guillern v. United States*, 450 F.2d 1189, 1192 (5th Cir. 1971); *Jiminez v. Aristequieta*, 311 F.2d 547, 558-60 (1962), *off'd per curiam sub nom. Jiminez v. Hixon*, 314 F.2d 654 (5th Cir.), *cert. denied*, 373 U.S. 914 (1963); *United States ex rel. Karadzole v. Artukovic*, 170 F. Supp. 459, 460-61 (S.D. Fla. 1959); *In re Ezeta*, 62 F. 972, 997-1004 (N.D. Cal. 1894); and *In re McMullen*, No. 3-78-1899 M.G. (N.D. Cal., memorandum decision filed May 11, 1979).

98. [1891] 1 Q.B. 149. See *supra* notes 25-26 and accompanying text.

99. Sir Charles Russell, Q.C., adopted the definition suggested by John Stuart Mill: An offense of a political character is "[a]ny offense committed in the course of or furthering of civil war, insurrection, or political commotions." *In re Castioni*, [1891] 1 Q.B. 149, 153 (as quoted in E. CLARKE, A TREATISE ON THE LAW OF EXTRADITION Appendix, CCIX (3rd ed. 1886)).



tional test is under-inclusive in that it appears to exclude from protection all political offenses which were not part of a general rising or rebellion. The over-inclusive aspect of the test is that it lays the framework for the claim that all acts committed during times of political disorder, without regard to the character or victim of the crime, should be insulated from extradition.<sup>100</sup>

The mechanical application of the *Castioni* test has led to results which commentators have called cruel and insane.<sup>101</sup> In the mid-1950's the Yugoslavian government sought the extradition of Andrija Artukovic, the former minister of internal affairs in the pro-Nazi government of Croatia during World War II, on the charge that he had ordered the murder of 200,000 inmates of Yugoslavian concentration camps.<sup>102</sup> The indictment specifically accused Artukovic of issuing "orders based on criminal motives, hatred, and the desire for power to members of bands . . . to carry out mass slaughters of the peaceful civilian population."<sup>103</sup> Three separate federal courts, however, determined the offenses charged to be "political" on the ground that they had occurred during the German invasion of Yugoslavia and the subsequent establishment of the short-lived independent government of Croatia.<sup>104</sup> The courts specifically declined to rule that war crimes against civilians were beyond the purview of the *Castioni* test,<sup>105</sup> simply because the offenses were committed in the course of a struggle for political power.<sup>106</sup>

A similar analysis recently led a United States magistrate to conclude that "[e]ven though the offense be deplorable and heinous, the criminal actor will be excluded from [extradition] if the crime is committed under these pre-requisites."<sup>107</sup> Thus, the *Castioni* test, carried to its "insane but logical" end,<sup>108</sup> would appear to protect terrorists from extradition. Such a result virtually is unavoidable

100. See Lubet and Czaczkes, *supra* note 95, at 201-06.

101. See *Hearings on S. 1639*, *supra* note 18, at 40 (statement of W. Hannay, attorney at law) ("absurdity and ultimate cruelty of applying" the *Castioni* test).

102. See *Artukovic v. Boyle*, 140 F. Supp. 245 (S.D. Cal. 1956), *aff'd sub nom. Karadzole v. Artukovic*, 242 F.2d 198 (9th Cir. 1957), *rev'd per curiam*, 355 U.S. 393 (1958), *decision on remand sub nom. United States ex rel. Karadzole v. Artukovic*, 170 F. Supp. 383 (S.D. Cal. 1959).

103. 24 F.2d at 204. The events took place in 1941 and 1942 when Yugoslavia was occupied by German and Italian troops. *Id.*

104. 140 F. Supp. at 246-47; 247 F.2d at 204-05; and 170 F. Supp. at 392-94.

105. 140 F. Supp. at 246-47; 247 F.2d at 204-05; and 170 F. Supp. at 392-94.

106. 170 F. Supp. at 393.

107. *In re McMullen*, No. 3-78-1899 M.G. (N.D. Cal., memorandum decision filed May 11, 1979), reprinted in *Hearings on S. 1639*, *supra* note 18, at 294.

108. See *Hearings on S. 1639*, *supra* note 18, at 55-56 (statement of W. Hannay, attorney at law) (The *Castioni* test "more often leads courts away from the right result than towards it.").



when the courts apply a test that focuses on the *context* of the crime as opposed to the *content* of the act. The British courts doubtless recognized this problem, as they have departed from the *Castioni* test to the point of virtual abandonment.<sup>109</sup> Unfortunately, the courts of the United States, in the absence of guiding legislation, have failed to keep pace with the realities of the modern world in the substantive development of the political offense doctrine.<sup>110</sup>

The *Castioni* test, despite its inadequacies and pitfalls, is nonetheless an accepted rule of law which is capable of analysis and application; it is useful as a benchmark for courts to guide their substantive understanding of the political offense exception. No such benchmark exists, however, with regard to the procedure for considering the exception. There is no statutory treatment of the issue, and the courts have not developed a uniform process to govern the manner in which the political offense exception may be raised, or the standard under which it is to be determined.<sup>111</sup>

The procedural concept of burden of proof may be divided into three components: burden of production, burden of persuasion, and standard of proof.<sup>112</sup> The allocation of the burden of production controls which party is obliged to present evidence first on a given point of law,<sup>113</sup> and the assignment of the burden of persuasion determines which party ultimately must convince the trier of fact.<sup>114</sup> Finally, the standard of proof sets the level of certainty which must be met in order for the party with the ultimate burden to prevail.<sup>115</sup>

In criminal cases, the general rule is that the defendant bears the

109. *Id.* at 55 ("England does little more than pay lip service to the *Castioni* rule."). For example, in 1954 the British courts applied the political offense exception in the absence of a political disturbance in the requesting country. Seven crew members of a Polish fishing trawler who had taken control of their boat from a communist crew in international waters were granted asylum. *Regina v. Governor of Brixton Prison, ex parte Kolczynski*, [1955] 1 Q.B. 540 (1954).

110. In *Abu Eain v. Wilkes*, 641 F.2d 504, 519-21 (7th Cir. 1981), *cert. denied*, 454 U.S. 894 (1981), the court held that the killing and maiming of children in a crowded Israeli marketplace could not be considered a political offense, but the court based the holding, at least in part, on the ground that the evidence had failed to show "a direct tie between the [Palestine Liberation Organization] and the specific violence alleged." *Id.* at 520. Though the court arrived at the praiseworthy conclusion that "the indiscriminate bombing of a civilian populace is not recognized as a protected political act," *id.* at 521, the court nevertheless felt constrained to mold its analysis to the limitations imposed by the *Castioni* rule. *Id.* at 519-21.

111. See generally Lubet and Czaczkes, *supra* note 95, at 206-10.

112. See generally Allen, *Presumptions, Inferences and Burden of Proof in Federal Civil Actions*, 76 Nw. U.L. REV. 892, 895-901 (1982).

113. *Id.* at 895.

114. *Id.*

115. *Id.*

burden of production for any affirmative defense.<sup>116</sup> Some United States courts, however, have required the requesting country to establish in the initial requisition that the offense charged was not political.<sup>117</sup> Furthermore, even those courts holding that the initial burden is on the defendant have disagreed as to the quantum of evidence that is necessary to satisfy the burden of production. Some courts have required substantial expert testimony concerning the surrounding political situation,<sup>118</sup> while others have required only the assertion of the defense.<sup>119</sup>

The cases show a similar confusion concerning the burden of persuasion. In *Ramos v. Diaz*,<sup>120</sup> for example, the court held that "when evidence offered before the Court tends to show that the offenses charged against the accused are of a political character, the burden rests on the demanding government to prove to the contrary."<sup>121</sup> This is clearly a defense-oriented approach, as the "tending to show" standard would require the requesting country, in

116. See, e.g., FED. R. CRIM. P. 12.

117. This approach was adopted by both the district court and the court of appeals in *Artukovic v. Boyle*, 140 F. Supp. 245 (S.D. Cal. 1956), *aff'd sub nom. Karadzole v. Artukovic*, 247 F.2d 198 (9th Cir. 1957), *supra* note 102. The Supreme Court ultimately rejected the approach in reversing per curiam, 355 U.S. 393 (1958).

118. See, e.g., *In re Abu Eain*, Magis. No. 79 M 175 W.D. Ill., (opinion filed Dec. 18, 1979), *aff'd sub nom. Abu Eain v. Wilkes*, 641 F.2d 504 (7th Cir. 1981), *cert. denied*, 454 U.S. 894 (1981). The magistrate's opinion is reprinted in the Brief for Appellant at Appendix G, *Abu Eain v. Wilkes*, 641 F.2d 504 (7th Cir. 1981).

119. The court in *Ramos v. Diaz*, 179 F. Supp. 459, 463 (S.D. Fla. 1959), followed the approach that requires only the assertion of the defense: "American authority indicates clearly that when evidence offered before the Court tends to show that the offenses charged against the accused are of a political character, the burden rests upon the demanding government to prove the contrary." *Id.* (citing 2 CC. HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 1025 (1951)). The court apparently shifted the burden to the requesting country based on the testimony of the defendants relating to their membership in a revolutionary movement at the time of the alleged crime.

The only major juristic dialogue on the issue of burden of proof occurred before the American Society of International Law in 1909. 1909 PROC. AM. SOC'Y INT'L L. 95-165. Two experts on extradition reached opposite conclusions based on policy considerations. J.R. Clark, Jr., a solicitor with the Department of State, argued that the accused bore the burden of raising and proving the political offense defense by a preponderance of the evidence. His opinion was based on general principles involved in the pleading of jurisdictional issues and the fact that the defense ran to the jurisdiction of the court in a habeas corpus proceedings. *Id.* at 95-124. On the other hand, J.W. Mack, a practitioner, argued that raising the political offense exception went to the merits of the extradition request, and once raised by the introduction of some evidence by the accused, the burden shifted to the requesting country to show that the act was a common crime by some unspecified standard of proof. Thus, it was Mack's position, at that time, that the underlying policy of the political offense exception, namely, the promotion of political change, required that special protection be afforded to anyone claiming to fall under the exception, as long as some political rationale could be applied under domestic law. *Id.* at 144-65.

120. 179 F. Supp. 459 (S.D. Fla. 1959).

121. *Id.* at 463. See *supra* note 119.

almost every case, to disprove the political nature of any charged offense, presumably by at least a preponderance of the evidence.<sup>122</sup>

More recently, the court in *Abu Eain v. Wilkes* held that the burden of persuasion rested on the defense to establish facts that brought the specific crime within the ambit of the political offense exception.<sup>123</sup> To meet this burden, the defendant would have to adduce evidence showing a "direct link between the perpetrator, a political organization's political goals and the specific act."<sup>124</sup> Although this decision represents the modern trend,<sup>125</sup> the courts have been far from unanimous in adopting a clear rule governing the burden of persuasion.<sup>126</sup>

Finally, questions regarding the applicable standard of proof have received scant attention. Those decisions that have addressed the issue generally have utilized the "preponderance of the evidence" standard,<sup>127</sup> but most courts have issued their rulings without discussing the standard of proof.<sup>128</sup>

122. See *Ramos v. Diaz*, *supra* notes 119-21, at 463. The requesting country in an extradition hearing only bears the burden of showing probable cause, as the ultimate issue of guilt or innocence is not under consideration by the extraditing court. See *supra* notes 66-67 and accompanying text. At the same time, however, the court does resolve the merits of the political offense exception issue. In order for the court to reach a decision, one party or the other must establish its case by the greater weight of the evidence.

See also *In re Abu Eain*, *supra* note 118. In his habeas corpus brief to the Seventh Circuit, Abu Eain argued that he had met the "tending to show" standard by presenting evidence of the general tactics of the Palestine Liberation Organization. He had offered evidence at trial that bombings directed at Israeli civilians were "typical and common" undertakings of the P.L.O., but he did not testify himself and he did not offer any evidence concerning the motivation behind the specific bombing with which he was charged. Brief for Appellant at 25-29, *Abu Eain v. Wilkes*, 641 F.2d 504 (7th Cir. 1981). On this basis Abu Eain argued that the requesting state was required to disprove that the charged murders were political crimes. *Id.* at 29.

123. 641 F.2d 504, 520-21 (7th Cir. 1981).

124. *Id.* at 521.

125. See *In re Mackin*, No. 80 Cr. Misc. 1, 45-46 (S.D.N.Y., opinion filed August 13), *aff'd*, *United States v. Mackin*, 668 F.2d 122 (2d Cir. 1981). The magistrate's opinion is reprinted in *Hearings on S. 1639*, *supra* note 18, at 140.

126. *Id.* See also *In re Abu Eain*, *supra* note 118; and *In re McMullen*, No. 3-78-1899 M.G. (N.D. Cal., memorandum decision filed May 11, 1979).

127. See, e.g., *In re Mackin*, *supra* note 125, at 45-46.

128. The magistrate noted in *In re Mackin*, *id.*, that neither *Abu Eain v. Wilkes*, *supra* note 123, nor *In re McMullen*, *supra* note 126, is helpful in establishing the requisite burden and standard of proof. The *Abu Eain* court, while requiring the defendant to show a link between the act charged and the political objective, did not explicitly overrule the "tends to show" standard enunciated in *Ramos v. Diaz*, 179 F. Supp. 459, 465 (S.D. Fla. 1959).

The *McMullen* court also complicated the issue by articulating two different standards of proof. The court found that the respondent had met its burden of establishing each element of the political offense exception, then concluded that this government had failed to meet its burden of presenting contradicting evidence. This would seem to indicate that a defendant only need introduce evidence which "tends to show" the political nature of the crime for the burden to shift to the government. *In re McMullen*, *supra* note 126, at 5. In the following paragraph the court implied that the applicability of the political excep-

The foregoing overview of the process for determining the extradition question in the United States illustrates the need for a clear legislative response to the present inadequacies in the substantive and procedural law.<sup>129</sup> The following section analyzes the proposed responses to the problems and recommends an extradition process that preserves the strengths of United States tradition and satisfies the requirements of the contemporary environment.

### III

#### EXTRADITION REFORM

The call for statutory reform of the extradition law of the United States has met with no dissent. Academics, practitioners, government officers and other interested observers agree that the entire extradition process must be reformed both for the benefit of the government, future defendants, and the vitality of the political offense exception.<sup>130</sup> The commentators are nearly unanimous on the need for several technical changes in the law. Thus, it is nearly certain that any legislative reform will abolish the rule of non-appealability.<sup>131</sup> In the future, both the defendant and the prosecution will be able to appeal decisions directly. It also appears that extradition hearings will be held exclusively in the federal courts, and that at least important cases will be removed from the magistrates to full district court judges.<sup>132</sup>

The consideration of the political offense exception, however, has stirred considerable controversy. The proposed changes in the treatment of the exception raise three principal questions: (1) How shall "political offense" be defined; (2) How shall the burden of proof be allocated; and (3) Should the political offense determination

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tion must be established by a preponderance of evidence. *Id.* at 6. See also, *Abu Eain v. Wilkes*, *supra* note 123 at 520.

129. See also *supra* notes 31-50 and accompanying text (citing executive disapproval of recent extradition proceedings as impetus for reform).

130. See *Hearings on S. 1639*, *supra* note 18, at 20 (statement of M.C. Bassiouri, professor, School of Law, De Paul University); at 69 (statement of W.M. Goodman, attorney at law); at 86 (statement of R.T. Capulong, chairperson of the Human Rights Committee of the Philippine-American Lawyers Association of New York, dated Dec. 5, 1981); at 4 (statement of M. Abbell, director, Office of International Affairs, Criminal Division, Department of Justice); and at 89 (statement of the American Civil Liberties Union, Letter dated Dec. 8, 1981).

131. The three versions of extradition reform under legislative consideration are: H.R. 6046, 97th Cong., 2d Sess. (1982); S. 1940, 97th Cong., 2d Sess. (1982); and S. 1639, 97th Cong., 1st Sess. (1981). See also 127 CONG. REC. S9960-S9961, § 3195 (daily ed. Sept. 18, 1981); S. RLP. NO. 475, 97th Cong., 2d Sess. 21, § 3195 (1982); and H.R. REP. NO. 627, 97th Cong., 2d Sess. 28 § 3195 (1982).

132. See S. REP. NO. 475, 97th Cong., 2d Sess. 16-7, § 3192 (1982); and H.R. REP. NO. 637, 97th Cong., 2d Sess. 7-12 (1982).



be removed from the courts?<sup>133</sup> Although the abolition of the judicial role has been the most controversial proposal of the three, the definitional and procedural questions may prove to be equally important in the long run. Furthermore, the satisfactory resolution of the definitional and procedural problems in the law could be determinative of congressional willingness to leave the political offense question in the hands of the judiciary.

#### A. THE DEFINITION OF A POLITICAL OFFENSE

The extradition reform bills presented to Congress define political offenses by exclusion.<sup>134</sup> These definitions follow identical patterns and state that an offense of a political character "normally"<sup>135</sup> does not include:

- (A) an offense within the scope of the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on December 16, 1970;
- (B) an offense within the scope of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on September 23, 1971;
- (C) a serious offense involving an attack against the life, physical integrity, or liberty or internationally protected persons (as defined in section 1116 of this title), including diplomatic agents;
- (D) an offense with respect to which a treaty obligates the United States to either extradite or prosecute a person accused of the offense;
- (E) an offense that consists of homicide, assault with intent to commit serious bodily injury, rape, kidnapping, the taking of a hostage, or serious unlawful detention;
- (F) an offense involving the use of a firearm (as such term is defined in section 921 of this title) if such use endangers a person other than the offender;
- (G) an offense that consists of the manufacture, importation, distribution, or sale of narcotics or dangerous drugs; or

133. See S. 1639, 97th Cong., 1st Sess. §§ 3194, 3196 (1981); S. 1940, 97th Cong., 2d Sess. §§ 3194, 3196 (1982); and H.R. 6046, 97th Cong., 2d Sess. §§ 3194, 3196, 3199 (1982).

134. S. 1639, *supra* note 133, does not contain a definition, because, under the bill, the determination of the political offense exception would not be made by the courts. S. 1940, *supra* note 133, defines political offenses by exclusion in § 3194(e). H.R. 6046, *supra* note 113, defines political offenses by exclusion in § 3194(e)(2). See *infra* notes 135-36 and accompanying text.

135. The language in each proposed definition varies only in minor aspects. Prior to amendment, S. 1940, *supra* note 133, provided the exclusions quoted in the text accompanying *infra* note 136. Amended S. 1940 § 3194(e) contains two subsections: (1) subsection one states that "a political offense does not include" provisions A, B, C, D, and G in text accompanying *infra* note 136; (2) subsection two states that "a political offense, except in extraordinary circumstances, does not include" provisions E and F in text accompanying *infra* note 136. Both subsections include a provision similar to H in the text accompanying *infra* note 136. The amended version of S. 1940, unlike the other proposed definitions, does not state that an offense of a political character "normally" does not include the particular crimes in provisions A, B, C, D, and G in text accompanying *infra* note 136. H.R. 6046, *supra* note 133, uses the language "except in extraordinary circumstances" in lieu of "normally."



(H) an attempt or conspiracy to commit an offense described in clauses (A) through (G) of this subparagraph, or participation as an accomplice of a person who commits, attempts, or conspires to commit such an offense.<sup>136</sup>

The reticence of the bills to define the term political offense in a comprehensive manner indicates that the drafters recognized the impossibility inherent in that task. In an area as volatile and diverse as international violence there can be no single test or rule which meaningfully and reliably defines a "political offense." It is possible to define what a political offense is not, however, through the process of excluding that conduct which is unacceptable, regardless of its motivation or context.<sup>137</sup>

The first four proposed exclusions essentially codify existing obligations under a variety of international conventions.<sup>138</sup> These exclusions represent a strong international consensus that crimes such as aircraft hijacking,<sup>139</sup> hostage taking,<sup>140</sup> and attacks on diplomats<sup>141</sup> cannot be shielded from prosecution. This approach, which also was taken in the 1977 European Convention on The Suppression of Terrorism,<sup>142</sup> avoids the overinclusiveness of the *Castioni*

136. See S. REP. NO. 331, 97th Cong., 2d Sess. 36 (1982). For the minor changes in the amended version of S.1940, *supra* note 133, see S. REP. NO. 475, 97th Cong., 2d Sess. 19-20 (1982). For the similar language in H.R. 6046, *supra* note 133, see H.R. REP. NO. 627, 97th Cong., 2d Sess. 48-49 (1982).

137. See *Hearings on S. 1639, supra* note 18, at 57 (statement of W. Hannay, attorney at law). On definitions by exclusion see Summers, *The General Duty of Good Faith—Its Recognition and Conceptualization*, 67 CORNELL L. REV. 810, 818-20 (1982); and Summers, "Good Faith" in *General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195 (explains the use of "excluder" conceptualizations, and applies that analysis to a defense of the definition of "good faith" by exclusion in general contract law and the Uniform Commercial Code).

138. See Convention on Offenses and certain other Acts committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, T.I.A.S. No. 6768, 704 U.N.T.S. 220; Convention on Suppression of Unlawful Seizure of Aircraft (Hijacking), Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192; Convention on Suppression of Unlawful Acts Against the Safety of Civil Aviation (Sabotage), Sept. 23, 1971, 24 U.S.T. 565, T.I.A.S. No. 7570; Convention on Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, T.I.A.S. No. 8532; and International Convention Against the Taking of Hostages, G.A. Res. 34/146, 34 U.N. GAOR Supp. (No. 46) at 245, U.N. Doc. A/RES/34/146 (1979).

139. See Convention on Offenses and Certain Other Acts Committed on Board Aircraft, *supra* note 138, ch. VI, art. 16; Convention on Suppression of Unlawful Seizure of Aircraft, *supra* note 138, art. 8; Convention on Suppression of Unlawful Acts Against the Safety of Civil Aviation (Sabotage), *supra* note 138, art. 8.

140. See International Convention Against the Taking of Hostages, *supra* note 138, arts. 8-10.

141. See Convention on Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, *supra* note 138, art. 8.

142. 15 I.L.M. 1272 (1976). Article I provides:

For the purposes of extradition between Contracting States, none of the following offences shall be regarded as a political offence or as an offence connected with a political offence or as an offence inspired by political motives:

a. An offence within the scope of the convention for the Suppression of Unlawful Seizure of Aircraft, signed at the Hague on 16 December 1970;

test,<sup>143</sup> at least with regard to those offenses which, due to current or future treaties, obligate the United States either to extradite or prosecute the accused.<sup>144</sup>

Two of the subsequent exclusions, which are not treaty-related, are far too restrictive in limiting the availability of the political offense exception. Sections (E) and (F) exclude all offenses involving the use of a firearm, homicide, assault with intent to commit serious bodily injury, kidnapping, and serious unlawful detention. Under certain circumstances, courts previously applied the relative political offense doctrine to precisely these types of offenses.<sup>145</sup> Accordingly, the exclusionary definition in these sections represents a substantial departure from prior law and interpretation of the political offense exception.

Without question, this approach excludes virtually all acts of terrorism from the ambit of the political offenses exception. It also offers the benefit of simple application. A rule that excludes all crimes of violence from the political offense exception will make it possible to apply the exception based upon nothing more than an examination of the underlying complaint. It will become unnecessary for any court to hold a hearing on the political offense question, since the exception never would apply to any situation that also involves the charge of a violent crime. Thus, had the proposed rule been applied to the *Abu Eain*, *McMullen*, and *Mackin* cases,<sup>146</sup> all of which required lengthy evidentiary hearings, each could have been

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- b. an offence within the scope of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 23 September 1971;
  - c. a serious offence involving an attack against the life, physical integrity or liberty of internationally protected persons, including diplomatic agents;
  - d. an offence involving kidnapping, the taking of a hostage or serious unlawful detention;
  - e. an offence involving the use of a bomb, grenade, rocket, automatic firearm or letter or parcel bomb if this use endangers persons;
  - f. an attempt to commit any of the foregoing offences or participation as an accomplice of a person who commits or attempts to commit such an offence.

*Id.* See also 16 I.L.M. 233 (1977) (noting that the convention was signed on Jan. 27, 1977 by seventeen countries).

143. See *supra* notes 97-100 and accompanying text.

144. See, e.g., S. 1940, 97th Cong., 2d Sess. § 3196(a)(3): "A political offense or an offense of a political character normally does not include . . . (D) an offense with respect to which a treaty obligates the United States to either extradite or prosecute a person accused of the offense."

145. See, e.g., *In re Mackin*, No. 80 Cr. Misc. 1 (S.D.N.Y., opinion filed August 13), *aff'd*, *United States v. Mackin*, 688 F.2d 122 (2d Cir. 1981); *In re McMullen*, No. 3-78-1899 M.G. (N.D. Cal., memorandum decision filed May 11, 1979); *Ramos v. Diaz*, 179 F. Supp. 452 (S.D. Fla. 1959); *In re Ezeta*, 62 F. 972 (N.D. Cal. 1894); *Regina v. Gornor* of Brixton Prison, *ex parte Kulczynski*, [1955] 1 Q.B. 540 (1954); and *In re Castioni*, [1891] 1 Q.B. 149.

146. See *infra* notes 147-49.

decided without trial at least with regard to the political offense question. Abu Eain was charged with placing a bomb which killed two children,<sup>147</sup> Mackin was charged with shooting a British policeman,<sup>148</sup> and McMullen was charged with the bombing of an army barracks in which a charwoman was killed.<sup>149</sup> Under the proposed violent crimes exclusion, none of these three defendants could have claimed the protection of the political offense exception, and indeed, no hearings would have been necessary to determine the inapplicability of the defense.

The problem with this exclusion of all violent offenses is that it sweeps too broadly and denies the protection of the political offense exception to some offenders the United States might wish, and indeed ought, to protect. The evolution of the political offense exception reveals a clear intent to apply the doctrine to at least some persons sought for violent acts committed in the course of rebellion or revolution.<sup>150</sup> Although the value-free application of the protection to heinous acts committed in the name of a political cause carries the concept too far,<sup>151</sup> it is nonetheless possible to shape an approach which excludes random terror, but which will not require the extradition of legitimate rebels against a tyrannical government. It is conceivable, for example, that one of the detained leaders of Poland's Solidarity movement might have escaped to the West using a firearm in the course of evading his captors. The United States would not wish to return a fugitive for trial under these circumstances. A carefully drafted requisition pursuant to the United States-Poland Treaty of Extradition,<sup>152</sup> however, coupled with the proposed "firearm exclusion," legally could compel rendition.

A better resolution of the definitional problem is to focus upon the nature of the violent activity charged, rather than upon the fact that violence of a specified type was involved. To effect this alternative focus, the definition could incorporate the existing legal notion that acts aimed against civilians, rather than at installations of gov-

147. *Abu Eain v. Wilkes*, 641 F.2d 504, 507 (7th Cir. 1981), *aff'g*, *In re Abu Eain*, Magis. No. 79 M 175 (N.D. Ill., opinion filed Dec. 18, 1979), *cert. denied*, 454 U.S. 894 (1981).

148. *United States v. Mackin*, 668 F.2d 122, 124 (2d Cir.), *aff'g*, *In re Mackin*, No. 80 Cr. Misc. 1 (S.D.N.Y., opinion filed August 13, 1981).

149. *In re McMullen*, No. 3-78-1899 M.G. (N.D. Cal., memorandum decision filed May 11, 1979), *reprinted in Hearings on S.1639*, *supra* note 18, at 294.

150. See Lubet and Czaczkes, *supra* note 4, at 194.

151. See, e.g., *In re McMullen*, *supra* note 149; and *Artukovic v. Boyle*, *supra* notes 102-06 and accompanying text.

152. Treaty of Extradition, Apr. 5, 1935, United States-Poland, 46 Stat. 2282, T.S. No. 908.

ernment, are not political offenses.<sup>153</sup> An additional subsection might be drafted to exclude from the definition of a political offense:

( ) an offense involving an attack against the life, physical integrity or liberty of any civilian or non-combatant; or an offense, comprising an act or acts of violence or a conspiracy or attempt to perform an act or acts of violence, which is intended to, or has the principal effect of, creating fear, terror, or disruption among the civilian populace, or which has the principal effect of disrupting the social order.

Such a provision would exclude terrorist activities such as the bombing of public places, kidnapping, and other acts of social disruption that are directed solely at the civilian populace. The decision-maker, however, would retain the ability to extend the protection of the exception to legitimate rebels or actual contenders in a struggle for national power.

One commentator noted that the specific exclusion of crimes against civilians from the ambit of the political offense exception may have the undesirable effect of sanctioning political murder "merely because the victim wears a uniform."<sup>154</sup> Sanity and decency preclude the adoption of a law that declares "open season on soldiers" and police.<sup>155</sup> There remains a distinction, however, between murder and rebellion when the victim is an armed officer of the state.<sup>156</sup>

No United States law defines the difference between crime and revolution, and the recent extradition cases offer little assistance in resolving the problem. The international law of war, however, seeks to distinguish precisely between privileged acts of combat and punishable atrocities or war crimes. Protocol I to the 1949 Geneva Conventions contains the list of "grave breaches" of the humanitarian rules of war for which individual soldiers may be subjected to trial or extradition.<sup>157</sup>

The International Law Association's Committee on International Terrorism suggested that, although the law of armed conflict does not apply to those acts commonly considered to comprise inter-

153. See *Abu Eain v. Wilkes*, 641 F.2d 504, 520-523 (7th Cir. 1981); *In re Meunier*, [1894] 2 Q.B. 415. Cf. *In re Ezeta*, 62 F. 972 (N.D. Cal. 1894). (San Salvador requested that its former President, Antonio Ezeta, and four of his military officers be extradited from the United States to stand trial for crimes Ezeta and his officers committed while attempting to maintain their government against the revolutionary forces that eventually overthrew them. The trial court held that all but one of the alleged crimes were political because they occurred during a period of armed rebellion. The one crime ruled not political involved the attempted murder of a civilian.)

154. *Hearings on S.1639*, *supra* note 18, at 55 (testimony of W. Hannay, attorney at law).

155. *Id.*

156. See, e.g., *In re Ezeta*, *supra* note 153.

157. Geneva Convention of 12 August 1949 Relative to the Protection of Civilian Persons in Time of War. 6 U.S.T. 3516, No. 3365, 75 U.N.T.S. 287.



national terrorism, the jurisprudence of war could be extended by analogy to develop the humanitarian law of international violence. Since the parties to the Geneva conventions voluntarily bound their armed forces to a code of conduct, there is no reason to insulate insurrectionists or other groups from the punishment to which soldiers may be subjected.<sup>158</sup> The committee's Fourth Interim Report reasoned: "[T]here is no reason in theory or practice why states should be willing to concede to politically motivated foreigners a license to commit atrocities while saddling their own organized armed forces with the restraints contained in the 1949 Geneva conventions against committing the same atrocities."<sup>159</sup>

Thus, the committee concluded that the humanitarian law requiring states to cooperate in the suppression of war crimes should apply with equal force to similar acts committed by persons not entitled to the soldiers' privilege.<sup>160</sup> The committee proposed that no person should be permitted to escape trial or extradition on the ground of political motivation, if the same acts, performed by a soldier engaged in an international armed conflict, would subject the soldier to trial or extradition.<sup>161</sup>

The committee's formulation, if adopted, would draw a clear line between acts of actual insurrection and random assaults of politically disaffected individuals. This approach, however, would be useful only as the definition of a *lower limit* for the protection of political violence. Standing alone, it would appear to invest every terrorist with the privileges normally reserved for organized combatants. Since it is necessary as a matter of law, philosophy, and social order to hold self-styled revolutionaries to a standard higher than that allowed to soldiers, it is essential that the "rules of war" test be employed only in conjunction with defined statutory exclusions from the political offense exception.

In summary, the definitional approach to the political offense exception contained in the proposed reform bills is admirable both in its departure from the *Castioni* test and its attempt to exclude terrorists from political sanctuary. The exclusion of virtually all violent acts from the protection of the political offense exception, however, is too restrictive and threatens to require the extradition of legitimate dissidents. The definition would be strengthened if it were to eliminate the blanket exclusion of all violent acts, and focus instead on

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158. Committee on International Terrorism, *4th Interim Report*, 1981, INT'L L.A. 10-11.

159. *Id.* at 11.

160. *Id.* at 11-12.

161. *Id.* at 12.



crimes against civilians and those that, by analogy, violate the law of war.

## B. PROCEDURE AND BURDEN OF PROOF

The rules that govern the manner in which the political offense exception is to be raised and determined are of the utmost importance. Must the defendant assert and prove, by whatever standard, that his offense was political, or must the requesting country prove that it was not? Although the answer to this question may often be outcome determinative, the United States cases have not provided a consistent approach to the problem.<sup>162</sup> Similarly, and inexplicably, the original extradition reform bills also ignored the burden of proof issue.<sup>163</sup> Through the process of public hearing and committee deliberation, however, two distinct proposals have emerged to govern the procedure for asserting the political offense exception.

House of Representatives Bill 6046 contains a bifurcated hearing procedure under which the presiding judge would not hear evidence on the political offense question unless and until the court determined that the defendant was otherwise extraditable.<sup>164</sup> This is a reasonable measure aimed at conserving judicial resources. It surely would serve no purpose to conduct a lengthy and complicated hearing on the political offense exception, only to determine later that there was insufficient evidence linking the defendant to the crime,<sup>165</sup> or that the applicable statute of limitations had already passed.<sup>166</sup> This approach is also contained in Senate Bill 1940 proposed by the Committee on Foreign Relations.<sup>167</sup>

Once the political offense issue is ripe for adjudication, there is agreement among the proposals that the defendant must bear the burden of proof.<sup>168</sup> Although the legislation does not divide this concept into its "production" and "persuasion" aspects,<sup>169</sup> it is clear that the intent of the drafters is to require the defendant both to raise the defense through the production of evidence and ultimately to persuade the trier of fact of its applicability.<sup>170</sup>

162. See *supra* notes 112-28 and accompanying text.

163. See S. 1639, 97th Cong., 1st Sess. (1981); and H.R. 5227, 97th Cong., 1st Sess. (1981).

164. H.R. 6046, 97th Cong., 2d Sess., §3194(c)(1)(B) (1982).

165. See, e.g., *id.* at § 3194(d)(1)(A-C); and *supra* notes 62-68 and accompanying text.

166. See, e.g., H.R. 6046, *supra* note 164, at § 3194(d)(2)(A).

167. See S. REP. NO. 475, 97th Cong., 2d Sess. 20, § 3194(f)(2) (1982).

168. *Id.* at 19, § 3194(e); and H.R. 6046, *supra* note 164, at § 3194(d)(2)(c).

169. See *supra* note 112 and accompanying text.

170. See S. REP. NO. 475, *supra* note 167, at 9: "Shifting the burden of the proof to the person seeking application of the political offense exception reinforces the Senate Foreign Relations Committee's belief that its legitimate application should be infrequent and also in accord[s] with the guidelines established in section 3194(c)(1) and (2)."

The placement of the full burden of proof on the person seeking the benefit of the political offense exception will add both regularity and predictability to the extradition process. This approach will resolve the conflict between the *Diaz* and *Abu Eain* cases,<sup>171</sup> and will eliminate the possibility that some court will refuse to extradite an admitted terrorist solely on the basis of evidence which "tended to show" that the charged offense was political.<sup>172</sup>

As a matter of judicial policy, the political offense exception should be viewed in the same manner as an affirmative defense. The party pleading the exception has put forward an affirmative claim that seeks to avoid the consequence of an otherwise valid extradition request. Since this matter is new to the proceeding, affirmative in nature, and comes from beyond the four corners of the requisition for extradition, it is a reasonable judicial conclusion that the party that raises the claim must also be the one to establish it.<sup>173</sup>

Practical considerations also mandate placing the burden on the party pleading the exception. Political motivation is a necessary, though not sufficient, condition for the invocation of the political offense exception. Consequently, the applicability of the exception will rest at least in part upon an evaluation of the goals, affiliations,

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which provides that for crimes involving the use of firearms, explosives or violent behavior, a person resisting extradition must satisfy a higher standard by demonstrating extraordinary circumstances. H.R. 6046, *supra* notes 164, 168, also contemplates that the defendant must raise and establish that the offense charged is of a political character. See H.R. REP. NO. 627, 97th Cong., 2d Sess. 19 (1982):

This approach also recognized that proof of whether particular conduct is a political offense generally involves introduction of some evidence that is usually within the unique knowledge of the person being sought. For example, the political connection that the conduct had with internal strife within the requesting state may be best known to the person being sought.

171. See *supra* notes 120-26 and accompanying text (*Ramos v. Diaz* used a "tended to show" standard, while *Abu Eain v. Wilkes* placed the full burden of persuasion on the defendant.).

172. *Id.*

173. In *Patterson v. New York*, 432 U.S. 197, 201-11 (1977), the Supreme Court recognized that the burden of establishing an affirmative defense may involve questions of policy rather than questions of fundamental fairness and constitutional rights. See generally MCCORMICK'S HANDBOOK ON THE LAW OF EVIDENCE § 337 (2d ed. 1972). The *Patterson* court held that, because, in a prosecution for second degree murder, the affirmative defense of extreme emotional disturbance does not serve to negate any facts of the crime charged, but rather constitutes a collateral issue involving facts beyond the elements of the crime, a state may require the defendant to carry the burden of persuasion on that issue. 432 U.S. at 201-16. See also *Leland v. Oregon*, 343 U.S. 790 (1952); and *United States v. Braver*, 450 F.2d 799, 801-02 (2d Cir. 1971) (allocation of the burden of proof on the issue of inducement when a defendant asserts the defense of entrapment to a criminal charge). The British courts require the defendant to establish the political character of the crime. See, e.g., *Schtraks v. Government of Israel*, [1961] 3 All E.R. 529, 534.

activities and principles of the defendant.<sup>174</sup> Only the defendant can produce evidence of his political motivation, and conversely, it is virtually impossible for the requesting country to provide evidence that a defendant was apolitical. Placing the burden on the requesting country would call for the proof of a negative, a task which in other contexts universally is seen as overwhelmingly difficult, if not impossible.<sup>175</sup>

The practical difficulty involved in placing the ultimate burden of proof on any party other than the defendant is illustrated by an example drawn from the *Abu Eain* case.<sup>176</sup> It was Abu Eain's claim that once he provided evidence which "tended to show" that the crimes with which he was charged were political, the burden of proof shifted to the prosecution to prove by a preponderance of the evidence that the offenses were not political. Following this construction, he claimed that he had met his burden by showing that bombings directed at Israeli civilians were "typical and common" undertakings of the Palestine Liberation Organization. Although Abu Eain neither testified nor offered any evidence concerning the motivations behind the specific bombings, he claimed on the basis of this "typicality," that the government was required to disprove the political nature of the crimes.<sup>177</sup> The government, of course, had no ability to provide such evidence, beyond a description of the crime itself. Indeed, it is virtually impossible to conceive of the form that such proof might take. How could the government of Israel or the United States prove that certain crimes were not secretly political? Arguably, if such a burden were to be placed on the government simply because the defendant in an extradition case had claimed the protection of the political offense exception, the process of extradition would grind to a standstill.

Every policy consideration dictates that the defendant should bear both the initial burden of producing evidence and the ultimate burden of persuasion on the political offense issue. This will require the defendant to present a *prima facie* case that the offense was a political one by producing sufficient evidence as to every element of

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174. See *Schitraks v. Government of Israel*, *supra* note 173, at 540, where Viscount Radcliff states: "In my opinion the idea that lies behind the phrase offense of a political character is that the fugitive is at odds with the state that applies for his extradition on some issue connected with the political control or government of the country."

175. See *Lubet and Czaezkes*, *supra* note 4, at 209-20.

176. See *supra* note 1.

177. Brief for Appellant at 25-29, *Abu Eain v. Wilkes*, 641 F.2d 504 (7th Cir. 1981). The presiding magistrate rejected this contention and ruled that the defendant was required to demonstrate the link between the alleged crimes and his political objectives. *In re Abu Eain*, Magis. No. 3-78-1899 (N.D. Cal., Opinion filed May 11, 1979).

his claim.<sup>178</sup>

The placement of the burden of proof does not, of course, resolve the question of standard of proof: what quantum of proof should be required in order to prevail in claiming the political offense exception?<sup>179</sup> The various reform proposals are divided on this issue. House of Representatives Bill 6046 would deny extradition where the political nature of the offense is proven by a "preponderance of the evidence."<sup>180</sup> Senate Bill 1940 would require the higher standard of proof by "clear and convincing evidence."<sup>181</sup>

The choice of a standard of evidence is an appropriate exercise of legislative discretion,<sup>182</sup> which should be made with a view toward advancing a substantial public policy.<sup>183</sup> As in the judicial context, this may be done through the process of balancing the competing interests involved.<sup>184</sup>

With regard to the political offense exception, the strongest policy arguments all favor the imposition of the higher standard of evidence upon the party seeking to assert the defense. The "mere preponderance" standard, which is generally employed in civil litigation, is not demanding enough, since it requires the production of only a minimally greater weight of the evidence in order for a party to prevail.<sup>185</sup> This is the most subjective of all standards, focusing on the relative strength of the evidence produced by the parties. It is suitable for the trial of tort and contract cases where the only issue to be resolved is which party is entitled to prevail in a claim for dam-

178. See *Hearings on S. 1639, supra* note 18, at 184-86 (reprint of *In re Mackin*, 80 Cr. Misc. 1 (S.D.N.Y., opinion filed August 13, 1981)); and Lubet and Czaczkes, *supra* note 175, at 209.

179. See *supra* note 95.

180. See H.R. 6046, *supra* note 164, at § 3194(d)(2)(c): "The court shall not order a person extraditable after a hearing under this section if the court finds— . . . the person has established by the preponderance of the evidence that any offense for which such person may be subject to prosecution or punishment if extradited is a political offense."

181. See S. R.P. No. 475, *supra* note 167, at § 3194(c).

182. See *Vance v. Terrazas*, 444 U.S. 252, 264-67 (1980) ("traditional powers of Congress to prescribe rules of evidence and standards of proof in the federal courts," *id.* at 265).

183. See *Santosky v. Kramer*, 455 U.S. 745, 752-57 (1982); *Jones v. Phillips Petroleum Co.*, 186 S.W.2d 868, 873-74 (Mo. 1945). See also *Allen, supra* note 112, at 896, n.17; and MCCORMICK'S HANDBOOK ON THE LAW OF EVIDENCE 786-88 (2d ed. 1972).

184. See *Santosky v. Kramer*, 455 U.S. 745, 754 (1982); and *Addington v. Texas*, 441 U.S. 418, 425 (1979).

185. Justice Blackmun, for the court in *Santosky v. Kramer*, 455 U.S. 745, 755 (1982), stated: "[W]hile private parties may be interested intensely in a civil dispute over money damages, application of a 'fair preponderance of the evidence' standard indicates both society's 'minimal concern with the outcome,' and a conclusion that the litigants would 'share the risk of error in roughly equal fashion,'" (quoting from *Addington v. Texas*, 441 U.S. 418, 423 (1979)). See also *Se-Ling Hosiery v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950): "[P]roof 'by a preponderance of the evidence' is the lowest degree of proof recognized in the administration of justice."



ages. The application of the political offense exception, however, involves weighty issues of international impact which should be decided by a more objective standard.<sup>186</sup>

The requirement of proof by clear and convincing evidence will strengthen domestic foreign policy by making it more difficult for terrorists to find haven in the United States.<sup>187</sup> The higher standard will limit the extension of sanctuary, at least at the judicial level, to those who can clearly prove that they are entitled to it. The clear and convincing evidence test also will serve the goal of preserving executive flexibility in matters touching upon foreign affairs,<sup>188</sup> because it will ensure that courts will decline to bar extradition in close or doubtful cases. Courts, instead, will certify such matters for consideration by the Secretary of State.

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186. "Clear and convincing evidence is 'that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established.'" *Hobson v. Eaton*, 399 F.2d 781, 784, n.2 (6th Cir. 1968). "Clear and convincing proof is a standard frequently imposed in civil cases where the wisdom of experience has demonstrated the need for greater certainty. . . . This high standard may be required to sustain claims which have serious social consequences or harsh or far-reaching effects on individuals." *United States v. Bridges*, 133 F. Supp. 638, 641, n.5 (N.D. Cal. 1955). See also *Schneiderman v. United States*, 320 U.S. 118, 125 (1943) ("To set aside such a grant [of citizenship] the evidence must be clear, unequivocal and convincing"—"it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt," quoting from *Maxwell Land-Grant Case*, 121 U.S. 325, 381 (1887).); *Carpenter v. Union Insurance Society of Canton, Ltd.*, 284 F.2d 155, 162 (4th Cir. 1960) (assertion of a criminal act as a defense in a civil action must be established by clear and convincing proof); *Regenold v. Baby Fold Inc.*, 68 Ill. 2d 419, 369 N.E.2d 858 (1977) (court should not set aside consent for adoption without proof by clear and convincing evidence that its execution was procured by fraud or duress); *Pontano v. Obbisso*, 580 P.2d 1026, 1027 (Or. 1978) ("Proof of conduct creating a constructive trust must be strong, clear and convincing evidence—evidence that is of 'extraordinary persuasiveness.'")

187. See, e.g., *Abu Eain v. Wilkes*, 641 F.2d 504, 520 (7th Cir. 1981), where Judge Harlington Wood, for the court, expressed his resolution that the United States not become a "safe haven" for terrorists: "We recognize the validity and usefulness of the political offense exception, but it should be applied with great care lest our country become a social jungle and an encouragement to terrorists everywhere." It has been the policy of the State Department to strictly construe extradition treaties when terrorist activities are involved. Former Secretary of State Cyrus Vance, for example, has stated on the floor of the Senate that the United States seeks to apprehend, bring to trial, and penalize international terrorists. See *An Act to Combat International Terrorism: Hearings on S.2236 Before the Senate Comm. on Governmental Affairs*, 95th Cong., 2nd Sess. 30 (1978) (Statement of Secretary of State Cyrus Vance). See also Lubet and Czaczkas, *supra* note 175, at 196.

188. See, e.g., *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936) ("[C]ongressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved"). Cf. *Baker v. Carr*, 369 U.S. 186, 211-13 (1962) (Although questions involving foreign relations are generally political questions, "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance").



These governmental interests outweigh the interests of individual defendants in avoiding extradition solely by meeting a lower burden of proof, because an adverse ruling will have greater consequences for the government than for the accused. As noted above, a final judicial ruling which upholds a political offense claim will bar extradition permanently, leaving the government without recourse;<sup>189</sup> the enactment of any version of the pending reform legislation will eliminate the government's option of refiling the extradition request in a new forum. A ruling against the exception, however, merely certifies the matter to the Secretary of State,<sup>190</sup> who may nonetheless deny extradition on the basis of the political offense exception or other humanitarian or policy grounds.<sup>191</sup> Finally, even a defendant who is extradited still will be afforded a full trial on the issue of guilt or innocence in the requesting country.

The initial political offense decision is binding for the government, but it is strictly preliminary with regard to the defendant. Under these circumstances it is appropriate, again at the judicial level, that the risk of error be resolved in favor of extradition. This is accomplished by requiring that the defendant prove the political nature of the crime by clear and convincing evidence.

### C. THE JUDICIAL ROLE

In the debate over extradition reform the most controversy has been generated by the proposal to remove the consideration of the political offense exception from the judiciary and place the decision solely with the Secretary of State. The Departments of State and Justice initiated this proposal,<sup>192</sup> which the Senate Judiciary Committee expressed in Senate Bill 1639.<sup>193</sup> Some commentators lauded

189. *See supra* note 89.

190. *See supra* notes 83 and 88 and accompanying text.

191. *See* S.1940, 97th Cong., 2d Sess. § 3196(a)(3) (1982); and H.R. 6046, 97th Cong., 2d Sess. § 3194(e)(3)(B) (1982).

192. *See Hearings on S.1639, supra* note 18, at 66 (Department of Justice letter in support of legislation, Aug. 4, 1981); at 67 (Department of State letter in support of legislation, Aug. 25, 1981); and at 319 (memorandum on extradition legislation, prepared by staff of the Senate Committee on the Judiciary in cooperation with the Departments of State and Justice, Sept. 1981).

193. *Id.* at 303, § 3194(a):

The court does not have jurisdiction to determine the merits of the charge against the person by the foreign state or to determine whether the foreign state is seeking the extradition of the person for a political offense, for an offense of a political character, or for the purpose of prosecuting or punishing the person for his political opinions.

*See also, id.* at 307-08, § 3196(a)(3):

If a person is found extraditable pursuant to section 3194, the Secretary of State, upon consideration of the provisions of the applicable treaty and this chapter, may— . . . decline to order the surrender of the person if the Secretary is persuaded, by written evidence and argument submitted to him by the person

the suggestion for sole executive authority over the dispensation of political asylum as an essential move toward preserving the integrity of United States foreign policy.<sup>194</sup> Others condemned the approach as an assault on fundamental civil liberties.<sup>195</sup> Alternative proposals continue the debate. House of Representatives Bill 6046 preserves the judicial role.<sup>196</sup> Senate Bill 1940, apparently a compromise, provides that the principal determination be made by the Secretary of State, followed by limited judicial review.<sup>197</sup> The three approaches—the executive, judicial and synthesis models—are analyzed in the following sections.

### *I. The Executive Model*

The extreme dissatisfaction with the rulings in the *Mackin* and *McMullen* cases<sup>198</sup> has led to mistrust of the ability of the judiciary to apply the political offense exception in a manner consistent with the international political goals of the government.<sup>199</sup> To ensure that the government is able to extradite offenders to friendly countries, the executive model gives the Secretary of State full discretion over the application of the political offense exception.<sup>200</sup> This admittedly result-oriented approach is not, however, an argument of convenience. Substantial theoretical and practical considerations support the position that the courts are not the appropriate forum for resolution of the political offense question.

The theoretical foundation for the executive model is the concept that application of the political offense exception is essentially a political decision. Although the courts consistently have rejected the argument that the political offense exception is a non-justiciable political question under the terms of the United States Constitu-

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sought, that the foreign state is seeking the person's extradition for a political offense or an offense of a political character, or for the purpose of prosecuting or punishing the person for his political opinions.

194. See *Hearings on S.1639*, *supra* note 18, at 18 (testimony of M. Abbell, Director of Office of International Affairs, Criminal Division, Department of Justice); at 53-55 (testimony of W. Hannay, attorney at law); and at 66 (State Department letter in support of legislation, Aug. 25, 1981).

195. *Id.* at 86-87 (statement of R.T. Capulong, chairperson of the Human Rights Committee of the Philippine-American lawyers Association of New York); and at 351-53 (statement of A.M. Jabara, Esq.).

196. See H.R. REP. NO. 627, 97th Cong., 2d Sess. (1982).

197. See S. REP. NO. 475, 97th Cong., 2d Sess. (1982).

198. See *supra* notes 31-41 and accompanying text.

199. See *id.*; and *Hearings on S.1639*, *supra* note 18, at 12 (testimony of D. McGovern, Deputy Legal Adviser, State Department); and at 51-59 (testimony of W. Hannay, attorney at law).

200. See *Hearings on S.1639*, *supra* note 18, at 13 (testimony of D. McGovern, Deputy Legal Adviser, Department of State); at 16 (testimony of M. Abbell, Director of Office of International Affairs, Criminal Division, Department of Justice); and at 55 (testimony of W. Hannay, attorney at law).

tion,<sup>201</sup> there can be no doubt that the decision is one which has major implications for the conduct of foreign affairs.

Application of the political offense exception involves the examination and evaluation of political conditions in foreign countries, and a judicial determination of the issue necessarily injects the court, at least to some extent, into political disputes.<sup>202</sup> Furthermore, the very nature of the extradition process, which is the enforcement of a treaty between two nations for the rendition of fugitives, is part and parcel of the conduct of foreign affairs. Extradition is intergovernmental and therefore political. Consequently, proponents of the executive model argue that, as a matter of policy, the political offense decision should be assigned to the executive branch in order to allow sensitive political judgments to be made by the political department of government.<sup>203</sup>

This policy position is buttressed by the argument that the courtroom is an extraordinarily cumbersome forum in which to determine facts, which lie close to opinion, concerning the internal affairs of other countries. A judge cannot conduct primary investigations and generally has no expertise in foreign affairs. Rather, the court must rely upon the witnesses, and experts marshalled by the parties, to give evidence concerning conditions thousands of miles, and perhaps even dozens of years, removed from the locus of the hearing. Under these circumstances the jurist is tempted to play the role of amateur historian, sociologist, and political scientist.

In the *Mackin* case, for example, the magistrate held a broad-ranging hearing in which she took testimonial "evidence" on the history, politics, and religious conflicts in Northern Ireland. The result was a lengthy opinion in which subtleties, nuances, and judgments of opinion were presented as discrete facts.<sup>204</sup> Although the magistrate certainly was diligent, the picture of Irish history and politics which emerged was at best problematic. The executive branch is better able to investigate, evaluate, and determine the nature of events in other countries, and is not restricted by the need to regard every aspect of a dispute as a fact which has been "proven" or "not proven."

William M. Hannay, a perceptive and persuasive advocate for the executive model, further argues that the judicial mode of deci-

201. See, e.g., *Abu Eain v. Wilkes*, 641 F.2d 504, 513-14 (7th Cir. 1981); and *United States v. Mackin*, 668 F.2d 122, 132-37 (2d Cir. 1981).

202. See *Hearings on S. 1639*, *supra* note 18, at 52-53 (testimony of W. Hannay, attorney at law).

203. See, e.g., *id.* at 53.

204. See *id.* at 188-223 (reprint of *In re Mackin*, No. 80 Cr. Misc. 1 (S.D.N.Y., opinion filed August 13, 1981)).

sion-making simply is inadequate to the task of applying the political offense exception:

Courts are accustomed to developing tests, rules, or formulas to resolve disputes—pegs on which to hang their decisions—pigeonholes into which to sort their cases. Applying hard and fast rules to foreign affairs, however, is like trying to shove a square plug in a round hole; nothing fits. Foreign affairs is one of those situations where courts should refrain from involvement because a meaningful test or rule simply cannot, indeed should not, be established. These are situations in which the exercise of political judgment is called for; where the risks of damage that may result from inhibiting the exercise of discretion and flexibility by imposing some unbending rule are too great.<sup>205</sup>

On this basis Hannay urges the adoption of an executive model that entirely precludes judicial review.<sup>206</sup> Recognizing that this approach would raise questions of procedural due process, Hannay argues that only the rights of the government need to be ensured in the political offense determination:

It is also misleading to talk of the fugitive's substantive rights. The "political offense" exception—like the concept of political asylum—is not a recognition of some inalienable right of the fugitive. He has no right to commit crimes in another country and escape extradition merely because the offenses were committed with a political purpose. The right involved is that of the *state* which has an interest in being able, when it deems it appropriate, to give political asylum for humanitarian reasons or, more generally, to refuse to become involved in domestic political disputes.<sup>207</sup>

In the final analysis the arguments in favor of the executive model rest heavily upon the perceived shortcomings—technical, practical, and theoretical—in past judicial applications of the political offense exception. There can be no doubt that the executive approach will offer a more streamlined, expeditious, and predictable format than has been utilized in the past. These benefits still must be weighed, however, against the traditional virtues of judicial review in the context of reformed definitional and procedural law.

## 2. *The Judicial Model*

Under the terms of House of Representatives Bill 6046<sup>208</sup> the judiciary will continue to make the initial determination concerning the political offense exception, subject to review by the Secretary of State in those cases where the courts rule in favor of extradition.<sup>209</sup>

205. *Hearings on S. 1639, supra* note 18, at 52-53.

206. *Id.* at 62.

207. *Id.* at 48-49.

208. H.R. 6046, 97th Cong., 2d Sess. (1982); *see also* H.R. REP. NO. 627, 97th Cong., 2d Sess. (1982).

209. *See* H.R. REP. NO. 627, 97th Cong., 2d Sess. 48, § 3194(d)(2): "The court shall not order a person extraditable after a hearing under this section if the court finds— . . . the person has established by the preponderance of the evidence that any offense for



As in the past, a final judicial ruling denying extradition will be binding on the government,<sup>210</sup> and the courts will be bound to refrain from passing judgment on either the motivations or procedures of the requesting state.<sup>211</sup> Although the bill also makes a number of important procedural changes,<sup>212</sup> proponents of the executive model criticize the bill's retention of the primacy of the judicial role as inhibiting government efforts to combat international terrorism.<sup>213</sup>

The argument for preservation of a judicial role is strong. Although in one sense the political offense exception is a matter of governmental grace,<sup>214</sup> the concept of political asylum is so widespread and so well-accepted that it has become something more than simply an optional provision found in bilateral treaties. The United Nations Declaration of Human Rights provides for the fundamental right of political asylum<sup>215</sup> and numerous multilateral treaties and conventions include the asylum concept.<sup>216</sup> In fact, the principle that a nation should not deliver a political offender to the government against which he has taken up arms is held so universally that we now commonly may speak of a right of political asylum.<sup>217</sup> Thus,

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which such person may be subject to prosecution or punishment if extradited is a political offense." The Secretary of State reviews extradition grants under § 3196(a), *id.* at 51:

If a person is ordered extraditable after a hearing under this chapter the Secretary of State, in such Secretary's discretion, may order the surrender of the person . . . to the custody of an agent of the foreign state requesting extradition, and may condition that surrender upon any conditions such secretary considers necessary to effectuate the purposes of the applicable treaty concerning extradition or the interest of justice.

210. *Id.* at 50, § 3195(a)(3)(B).

211. *Id.* at 49, § 3194(e)(3)(A): "Any issue as to whether the foreign state is seeking extradition of a person for the purpose of prosecuting or punishing the person because of such person's political opinions, race, religion, or nationality shall be determined by the Secretary of State in the discretion of the Secretary of State."

212. See *supra* text accompanying notes 131-32 (provisions for hearing by a full district judge and direct appeal by the losing party).

213. See *Extradition Act of 1982: Hearings on H.R. 5227 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 97th Cong., 2d Sess. 4-6 (statement of D. McGovern, Deputy Legal Adviser, State Department, Jan. 26, 1982).

214. See *Hearings on S. 1639, supra* note 18, at 48-50 (testimony of W. Hannay, attorney at law).

215. The Universal Declaration of Human Rights, *supra* note 11 (quoting article 14 on the right to political asylum).

216. See, e.g., Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267; International Convention on Economic, Social, Cultural, Civil and Political Rights, 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316; and Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

217. See generally M. GARCIA-MORA, *supra* note 8; Garcia-Mora, *The Nature of Political Offenses: A Knotty Problem of Extradition Law*, 48 VA. L. REV. 1226 (1962); Krenz, *The Refugee as a Subject of International Law*, 15 INT'L & COMP. L.Q. 90 (1966); Roth, *The Right of Asylum Under United States Immigration Law*, 33 U. FLA. L. REV. 534 (1981).



the political offense exception is a concept which is involved intimately with the international protection of human rights.

Even in the absence of a human rights analysis, extradition proceedings involve significant issues of individual physical liberty. The consequence of an order of extradition is to compel the accused to stand trial in a country which may be thousands of miles from the place of his apprehension; and this will almost invariably involve the effectuation of an involuntary transfer in the custody of the agents of the requesting country.<sup>218</sup> Furthermore, though we commonly think of extradition in terms of transient fugitives, there is no bar in United States law to the rendition of resident aliens or even United States citizens.<sup>219</sup> Thus, an order of extradition may result in virtual banishment from home and family, a punishment which in other contexts has been called the loss of "all that makes life worth living."<sup>220</sup>

The tradition of the United States has been to resolve questions of individual rights in a neutral judicial forum. Although neither the Constitution nor any international convention appears to require judicial participation in the extradition process,<sup>221</sup> the political offense exception has been considered a matter of fundamental human rights for over 100 years: "[E]xtradition without an unbiased hearing before an independent judiciary . . . [is] highly dangerous to liberty and ought never be allowed in this country."<sup>222</sup> As the Court of Appeals noted in *Mackin*, the United States traditionally has applied this proposition with equal force to both the "probable cause" and "political offense" aspects of extradition proceedings.<sup>223</sup>

A major strength of the judicial process is that it provides for decision-making in a public forum, attended by all the trappings of fairness and completeness which a democratic system of government values and ensures. A court may provide an environment which is insulated from expediency and which is dedicated only to the determination of truth and the protection of individual rights. Of course, the courts have no monopoly on fairness, and the executive branch is capable of rendering principled and impartial decisions on the polit-

218. See 18 U.S.C. § 3186 (1976).

219. See, e.g., *United States v. Ryan*, 360 F. Supp. 265 (E.D.N.Y. 1973) *In re Ryan*, 360 F. Supp. 270, 272 n.4 (E.D.N.Y. 1973); and H.R. REP. NO. 627, 97th Cong., 2d Sess. 21 (1982).

220. *Klapprott v. United States*, 335 U.S. 601, 612 (1949) (quoting from *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922)).

221. See, e.g., *Hearings on S. 1639*, *supra* note 18, at 48 (testimony of W. Hannay, attorney at law).

222. *In re Kame*, 55 U.S. (14 How.) 103, 113 (1852). See also *United States v. Mackin*, 668 F.2d 122, 132-33 (2d Cir. 1981).

223. *United States v. Mackin*, 668 F.2d 122, 132-37 (2d Cir. 1981).

ical offense exception. The judicial forum, however, brings with it an appearance of propriety and regularity which cannot be duplicated in a purely executive proceeding. With regard to an issue as sensitive to international public opinion as is the political offense question, the adage that the appearance of fairness is as important as fairness itself, applies with substantial force.

Opponents of judicial participation argue that it is necessary to adopt an executive model in order to avoid the embarrassment to the government which results when the courts deny extradition on political grounds.<sup>224</sup> The determination of the political offense issue by a neutral and judicial forum, however, actually might diminish the possibility of embarrassment to the government in the conduct of foreign affairs. Although the executive model will allow the government to take whatever course it chooses, thereby avoiding the problem of executive inability to render a fugitive despite a governmental desire to do so, a principled application of the political offense exception could require the Secretary of State to refuse to extradite an individual despite the desire of the government to maintain cooperative relations with the requesting country. A rebuff to a friendly government, emanating directly from the office of the State Department, might prove more disruptive to diplomatic relations than would the decision of a neutral court governed by internationally accepted standards.

The *McMullen* case provides an example. McMullen's offense was clearly directed against an installation of the British army.<sup>225</sup> The magistrate may have erred in applying the political offense exception to the particular circumstances of McMullen's crime; however, under certain circumstances, some members of the Irish Republican Army might commit an offense against the British which could only be deemed political. In such a case, it could be more advantageous to the conduct of United States foreign policy if the decision against extradition stemmed from the judiciary rather than directly from the executive. The use of the judicial branch as the initial decision-maker would serve as a shield that would allow the executive to avoid confrontation with friendly governments over matters of international extradition.

The "judicial shield" also may serve to insulate the government from adverse international consequences in cases in which the courts

224. See, e.g., *Hearings on S. 1639*, *supra* note 18, at 45-46 (testimony of W. Hannay, attorney at law); *Hearings on H.R. 5227*, *supra* note 213, at 6 (statement of D. McGovern, Deputy Legal Adviser, Department of State, Jan. 26, 1982). See also, *United States v. Mackin*, 668 F.2d 122, 133 (2d Cir. 1981).

225. *In re McMullen*, No. 3-78-1899 M.G. (N.D. Cal., memorandum decision filed May 11, 1979) (*reprinted in Hearings on S. 1639*, *supra* note 18, at 294).

ultimately approve extradition. The decision to extradite Abu Eain to Israel was enormously unpopular both in the United States and abroad. A well-organized "Defense Committee" mounted a substantial publicity campaign on Abu Eain's behalf, and a number of Congressmen questioned the government's prosecution of the case.<sup>226</sup> The ambassadors of several Arab countries vehemently protested the extradition,<sup>227</sup> and the United Nations General Assembly passed a resolution "strongly deploring" the rendition of Abu Eain.<sup>228</sup> The Jordanian ambassador denounced the extradition as "a disgrace to human rights, human dignity, international law, and moral imperatives."<sup>229</sup>

The United States responded to this storm of protest both by defending the extradition on its merits and by invoking the fairness of United States judicial procedures. The State Department's Memorandum Decision allowing the extradition repeatedly relied upon the comprehensive nature of the judicial process as proof of the inapplicability of the political offense exception.<sup>230</sup> The United States representative to the United Nations, speaking on the floor of the general assembly, argued against the resolution of condemnation by detailing the fairness of the judicial process afforded to Abu Eain.<sup>231</sup> Although the United Nations resolution eventually was

226. See 127 CONG. REC. H 9344 (daily ed. Dec. 10, 1981) (statement of Rep. Crockett); and 128 CONG. REC. H104-H105 (daily ed. Jan. 28, 1982) (statement of Rep. Findley).

227. See 36 U.N. GAOR (101st mtg., Agenda item 12) at 2-3, 38-40, U.N. Doc. A/L.58 (1981) (statement of Ambassador Nuseibeh, Jordan); at 22 (statement of Ambassador Razzooqi, Kuwait) [hereinafter 36 U.N. GAOR].

228. See 36 U.N. GAOR, *supra* note 227, at 22 (statement of Ambassador Razzooqi, Kuwait, introducing the draft resolution): "In operative paragraph 1 the General Assembly 'Strongly deplores the action of the Government of the United States of America in extraditing Mr. Ziad Abu Eain to Israel, the occupying power.'"

229. *Id.* at 2 (statement of Ambassador Nuseibeh, Jordan).

230. See *Hearings on S. 1639, supra* note 18, at 133 (Memorandum of decision of the Department of State in the case of the request by the State of Israel for the extradition of Ziad Abu Eain).

231. See 36 U.N. GAOR, *supra* note 227, at 26 (statement of Ambassador Adelman, United States):

Let me state unequivocally that Mr. Abu Eain received a fully independent and impartial judicial review of the extradition request. The United States Magistrate, after hearing all of the evidence presented by the prosecutor and by Abu Eain, found him extraditable under the terms of the United States-Israel extradition treaty.

The findings and the conclusions of the Magistrate were challenged by petition for a writ of habeas corpus. In denying the petition, the United States District Court judge reviewed the Magistrate's findings at length. The United States Court of Appeals for the Seventh Circuit affirmed the order of denial, again reviewing the findings and conclusions of the Magistrate.

Following judgment by the United States Court of Appeals, the defendant petitioned the United States Supreme Court for a writ of *certiorari*. Representing him as one of his attorneys, both in the Court of Appeals proceedings and before the United States Supreme Court, was a former United States Attorney-

adopted by a substantial margin,<sup>232</sup> the effectiveness of the due process argument was evidenced by the decisions of at least two delegations that premised abstention upon respect for the United States judicial system.<sup>233</sup>

The judicial approach to the initial determination of the political offense exception is cumbersome, time consuming, and occasionally unreliable. The principal merit of the system, however, is precisely that the outcome of the process cannot be controlled or determined by the political branches of government. This element of independence gives the judicial model an internationally recognizable appearance of fairness and propriety, which allows the executive to invoke the credibility of the judiciary as a shield against criticism and condemnation.

Proposed definitional and procedural reforms remedy the defects in the past judicial process, while the judicial model preserves the strength of the traditional judicial shield in the United States extradition process.<sup>234</sup> Furthermore, the proposed changes in appealability,<sup>235</sup> and the retention of the Secretary of State's discretion over ultimate rendition,<sup>236</sup> should allay remaining fears raised by the three recent cases that are cited by proponents of the executive model.<sup>237</sup> The political asylum determination is tied intimately

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General. The Supreme Court, after considering full briefs on the issues, decided that the case did not merit further review and denied the request for *certiorari*. There can be no doubt that the defendant was adequately represented and accorded all due process rights guaranteed in such proceedings and that the United States judiciary, on all three levels, accorded the defendant full, independent and impartial review.

232. The General Assembly adopted the resolution by 75 votes to 21, with 43 abstentions. *Id.* at 111-12.

233. Ambassador Pinies from Spain stated: "The draft resolution describes the detention of Mr. Abu Eain as illegal which seems to call into question the judicial system of the United States. In those circumstances, we shall be obliged to abstain on the vote on the draft resolution before us." *Id.* at 11.

Ambassador Auguste of Saint Lucia also stated that his delegation would abstain out of deference to the judicial system of the United States:

On the other hand, we must jealously guard against the intrusion of third States into the internal affairs of a State, particularly when this applies to the operation of the judicial system. The corporate body of established law, giving evidence of practice throughout the common law countries, establishes beyond doubt the total independence of the judiciary. There is no ground, *prima facie*, and in consideration of the decision of the United States Supreme Court, to warrant any refutation of the extradition judgment based on an intimation that the Court may have acted less than scrupulously in determining that Ziad Abu Eain had a proper and legitimate case to answer before the Israeli courts within the term of the Penal Code of the State of Israel.

*Id.* at 91-92.

234. See *supra* sections III.A. and B, and text accompanying *supra* notes 224-25.

235. See *supra* notes 131-32 and accompanying text.

236. See *supra* note 209 and accompanying text.

237. See *supra* notes 198-206 and accompanying text.



to recognized fundamental human rights; the decision is not solely political.<sup>238</sup> By recognizing the requirements of the contemporary environment in reforming the definition of a political offense, the judicial inquiry need not be as unreliable as past decisions reflect.<sup>239</sup> Thus, retaining the primacy of the judicial role in the context of substantive and procedural reform preserves the traditional strengths of the United States process, while it resolves the problems posed by modern international terrorism.

### 3. *The Synthesis Model*

Following the first round of congressional debate, an amended bill was introduced in the Senate which attempted to synthesize the executive and judicial approaches to the political offense exception.<sup>240</sup> Senate Bill 1940 creates a system of executive primacy in the decision-making, while maintaining the possibility for limited judicial review.

The synthesis model removes the political offense decision from the jurisdiction of the trial court<sup>241</sup> and gives the Secretary of State responsibility for the initial determination.<sup>242</sup> A defendant claiming the benefit of the exception would be entitled to submit written evidence and argument to the State Department, but no adversary hearing would be held and no testimony would be taken.<sup>243</sup> In those cases in which the Secretary of State has denied the political offense claim, the decision would be appealable to a United States Circuit Court of Appeals, with the provision that the court could not set aside the Secretary's decision if it was based on substantial evidence.<sup>244</sup>

238. Proponents of the executive model disagree. See *supra* notes 200-03 and accompanying text.

239. See *supra* section III.A.

240. S. 1940, 97th Cong., 1st Sess. (1981). See S. REP. NO. 331, 97th Cong., 2d Sess. (1982).

241. S. REP. NO. 331, 97th Cong., 2d Sess. 33, § 3194(a) (1982): "The court does not have jurisdiction to determine . . . whether the foreign state is seeking the extradition of the person for political offense, for an offense of a political character, or for the purpose of prosecuting or punishing the person for his political opinions."

242. *Id.* at 35, § 3196(a)(3):

If a person is found extraditable pursuant to section 3194, the Secretary of State, upon consideration of the provisions of the applicable treaty and this chapter—  
 . . . shall decline to order the surrender of the person if the Secretary is persuaded by written evidence and argument submitted to him by the person sought, that the foreign state is seeking the person's extradition for a political offense or an offense of a political character, or for the purpose of prosecuting the person for his political opinions.

243. *Id.* at 20.

244. *Id.* at 36, § 3196(a):

A decision by the Secretary . . . denying the person's claim that the foreign state is seeking his extradition for a political offense or an offense of a political charac-

At first, this approach appears to answer many of the objections that have been raised to both the executive and judicial models. It eliminates the need to hold lengthy and potentially embarrassing hearing in the trial court and it affirms the primacy of the executive branch in making political decisions of international import.<sup>245</sup> The synthesis model, nonetheless, preserves the possibility of impartial judicial review as a safeguard against arbitrary extradition.

Closer scrutiny, however, reveals that this synthesis actually combines the worst elements of both of its components. The Secretary of State will be required to make a public ruling on the political offense question prior to determination by any court. Thus, the Secretary may be placed in the vulnerable position of having his personal order in favor of extradition rejected as unlawful by a United States court. Alternatively, the Secretary will be unable to defer to the courts the embarrassing decision to deny the extradition request of a friendly country or wartime ally.<sup>246</sup> In short, the synthesis model fails to accomplish the goal of enhancing executive flexibility, while at the same time it denies the Secretary of State the benefit of the judicial shield. Thus, proponents of the executive model should find the synthesis model unacceptable.

Senate Bill 1940 similarly should be unsatisfactory to advocates of the judicial model, because it fails to provide for a public evidentiary hearing.<sup>247</sup> While review by a court of appeals does provide for some participation by an independent judiciary, the substantial evidence standard that the bill imposes will require the court in most cases to summarily affirm the Secretary's decision.<sup>248</sup>

The synthesis model clearly represents an attempt to resolve the conflict between the executive and judicial approaches to the political offense exception. This resolution, however, combines all of the vices of the two pure models, while containing few of their virtues. The synthesis approach, if adopted, will fail to provide adequate due process safeguards for the accused and needlessly will expose the Secretary of State to the possibility of rebuke on sensitive international issues.

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ter may be appealed by the person to the United States court of appeals to which an appeal under section 3195 would lie. The court shall not set aside the Secretary's decision if it is based on substantial evidence.

245. *Id.* at 20.

246. *See* H.R. REP. NO. 627, 97th Cong., 2d Sess. 21 (1982).

247. *Id.*

248. *Id.* at 23.

## CONCLUSION

Current United States extradition treaties do not establish a definition of the political offense exception and do not provide a format for its application.<sup>249</sup> The jurisprudence developed through the judicial process has not proven adequate to deal with the situations confronting it in modern times. Consequently, the entire area of law is ripe for legislative reform. The enactment of a single, comprehensive statute that will govern the application of nearly 100 bilateral treaties is necessarily a complex undertaking. Care must be taken to avoid placing the United States in breach of existing treaties that may have been premised on the traditional process,<sup>250</sup> and due regard must be given to the norms and practices of international custom.<sup>251</sup>

249. See *supra* notes 17 and 46.

250. It is beyond question that Congress assumes the power to legislate even in direct contravention of both existing treaties and international law. See, e.g., *Cook v. United States*, 288 U.S. 102, 119-20 (1933); *White v. Mechanics Securities Corp.*, 269 U.S. 283, 300 (1925); *Chinese Exclusion Case*, 130 U.S. 581, 600 (1889); and *Head Money Cases*, 112 U.S. 580, 598-99 (1884). Legislation is not to be interpreted as abrogating a treaty provision unless such an intent was clearly manifested by Congress. See, e.g., *Pigeon River Co. v. Charles W. Cox, Ltd.*, 291 U.S. 138, 157-60 (1934); *Cook v. United States*, 288 U.S. 102, 119 (1933); and *United States v. Payne*, 264 U.S. 446, 448 (1924).

The current proposals for extradition reform do not appear to be intended to abrogate any treaties. Rather, the proposals have been offered to revise the antiquated statutes which govern the implementation of existing treaties. See *Hearings on S. 1639, supra* note 18, at 5 (statement of M. Abbell, Director, Office of International Affairs, Criminal Division, Department of Justice). Procedural matters are domestic in nature and are appropriate subjects for congressional determination. Congress may repeal or modify legislation in order to better implement treaty provisions. See G. SUTHERLAND, CONSTITUTIONAL POWER AND WORLD AFFAIRS 139 (1919). In any event, the issue of breach of a bilateral treaty is determined by the affected party, *id.* See also *Charlton v. Kelly*, 229 U.S. 447, 473-76 (1913). Because each of the proposed reform bills simplifies the extradition process, it is inconceivable that any treaty partners of the United States would declare the United States to be in breach for enacting reforms that are likely to result in fewer denials of extradition requests. Whether a future defendant will be able to raise a defense of "reliance" on the old law is an issue which is yet to be determined.

251. Although the United States is not obliged to follow customary international law in the area of extradition, see *supra* note 250, the current reform debate has given substantial consideration to international practice. The most commonly proposed definition of "political offense" relies on existing treaties and the European Convention on the Suppression of Terrorism, *supra* note 142. See *supra* notes 136-44 and accompanying text.

There is no uniform international practice regarding the procedure for applying the political offense exception. The nations of the world use executive, judicial and synthesis models. The judicial model is predominant among the common law countries, although both Canada and Australia follow the executive approach. See, e.g., Extradition Act, 1870, 33 & 34 Vict., ch. 52, § 3 (United Kingdom); and Extradition (Foreign States) Act, [1966]. AUSTR. C. ACTS No. 76 at 660, § 14. Among the European nations France uses a judicial model (Extradition Law of March 10, 1927 D.P. IV 265); West Germany follows a strictly executive approach (*supra* note 12); and Austria and Switzerland have mixed systems (Statute on Extradition, 1979 ARGH § 14 (Austria); Laws of Jan. 22, 1892 A.S., Art. 10(1) (Switzerland)). Similarly, there appears to be no uniform practice, and consequently no customary international law, concerning matters such as burden of proof or appealability.

The debate on the future of the political offense exception has been healthy and productive. It now appears certain that the legislature will provide much needed guidance in this little known but sensitive area, and that a statutory definition of the political offense exception will emerge which is consonant with United States policy toward the apprehension and punishment of international terrorists.

The judicial model for determination of the political offense exception is the approach that best harmonizes the protection of political dissent with the punishment of wanton violence. Although the past judicial practice had its shortcomings, procedural and substantive reforms will resolve those problems. The enactment of a definition of political offense which abandons the overinclusive *Castioni* test will ensure that the courts do not extend the protection of the exception to those who practice violence against civilians. Furthermore, placing the burden of proof on the defendant and adopting a clear and convincing evidence standard will reduce the potential for judicial error and will maximize executive flexibility behind a judicial shield. Finally, the availability of direct appeal for all parties will provide for adequate judicial review and will eliminate the potential for a magistrate to thwart the foreign policy goals of the executive.

Following the adoption of these reforms, initial jurisdiction over the political offense exception may continue to reside safely in the judiciary without fear of unduly limiting the discretion of the executive in the conduct of foreign affairs. By maintaining the primacy of the neutral judicial forum, the vitality of the political offense exception, with its intimate ties to fundamental human rights, can be preserved.

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Thus, the United States should be relatively free to adopt extradition procedures according to considerations of domestic policy. Although this legislative freedom may be circumscribed by broad international principles (*see supra* notes 9-11 and accompanying text), those issues cannot be discussed in the abstract and must be saved for consideration upon the passage of legislation.



Mr. HUGHES. Well, thank you very much for a really, very, very comprehensive, insightful statement.

One of the arguments you make is that the rule of noninquiry has served us well, that it has proper balance and division of labor, and that it was carved out by the courts which have said that it isn't really within their realm to be determining the motivation of a requesting jurisdiction or the circumstances surrounding that nation's request—that that is a purely executive function.

My question is: With the political offense question, when we carve out an extraordinary circumstances exception, doesn't that, by its very nature, entail that type of an inquiry by the judiciary?

Mr. LUBET. Well that, I suppose, would depend in part on the nature of the report that accompanies the bill. I had read extraordinary circumstances to mean circumstances of fact; for example, if a crime of violence were committed in the course of escape from a prison in Poland—Lech Walesa, was the example that sprang to mind last year—if the circumstances which surrounded it amounted to necessity to protect one's family in the midst of a revolution. So, I have read extraordinary circumstances as meaning circumstances of fact. They are susceptible, I think, of the other interpretation.

Mr. HUGHES. Let me read to you what our report said, in the last Congress. And that doesn't mean that the report language this year would be the same, but it does give you some indication of how this committee felt about it.

The balancing test, in determining whether extraordinary circumstances exist—I paraphrase—should include a determination of whether the victims were part of a civilian government or the military. To the extent that the crime involved a random, ad hoc act of violence against innocent civilians, it would be more difficult to establish that extraordinary circumstances existed.

The balancing test should also include an examination of the relationship between the person being sought and any political organization, and whether the contact allegedly engaged in was done in the furtherance of that group's political goals. The facts should work to exclude from consideration as political offenders persons who were not connected with any coherent group; that is, for example, drug traffickers.

And it goes on to suggest that we should be looking into a number of circumstances that would have political overtones.

Doesn't that suggest that the court is going to be considering similar issues in both the political offense exception and the rule of noninquiry?

Mr. LUBET. Obviously, Congressman, there is a continuum there, and no matter where the line is drawn the next point on the other side will be very close. The report which you just read to me is still comprised of facts and circumstances concerning the nature of the offense and characteristics of the defendant, which have, traditionally, been determined by the courts. But what it excluded, and I think rightly so, were those circumstances which go to the nature of the Government and the motive of the request of the Government.

Mr. HUGHES. Let me ask you. The doctrine of extraordinary circumstances really has not been defined by the court. You pretty

much equate extraordinary circumstances with the existence of a presumption, and there is a great deal of case law about presumptions on various subjects. Would it be preferable to use the term "presumption"; that is, the presumption would apply against the political offense exception, as opposed to using the term "extraordinary circumstance"?

Mr. LUBET. Actually, I think the extraordinary circumstance test is better than the use of presumption.

Mr. HUGHES. Why?

Mr. LUBET. Well, this gets into a lengthy discussion of some of the modern scholarship in the field of evidence where the trend is away from using any presumptions anywhere, and phrasing all burdens in terms of burden of production, burden of proof, and necessity of establishing facts.

It is my experience as a trial lawyer that presumptions are just hopelessly confusing, and that, as much as possible, they should be avoided. Here I think that the phrase that there was a presumption against the application of the political-offense exception would only lead to substantial confusion and additional litigation. And as unclear as extraordinary circumstances might be, I think it is a step in the right direction.

Mr. HUGHES. I think your articulation of the difference between a request for asylum and for extradition is an excellent one.

I gather you feel that there would be no reason to stay extradition hearings, if a request for asylum was made.

Mr. LUBET. Excuse me. I'm sorry.

Would you repeat that?

Mr. HUGHES. Yes.

I asked previous witnesses if they would stay an extradition hearing until an asylum decision had been rendered. And I take it, from what you have just said, that you would not; an asylum hearing should not stay a hearing on an extradition request.

Mr. LUBET. I would do the opposite; I would stay the asylum proceeding pending the outcome of the extradition. It seems to me the extradition takes precedence.

Mr. HUGHES. Sure.

Mr. LUBET. In fact, I think I can prove it. Assume a person is in the United States illegally and is apprehended, and sought to be deported, and that he makes a request for asylum and the request for asylum is granted, and the person is now legally in the United States. Three weeks later an extradition request is made based upon information that wasn't known before; The person is being sought for murder in the country of his origin. Certainly the grant of asylum would be no defense, or ought not to be a defense, to the request for extradition. The extradition should be at least able to go forward. Notwithstanding a grant of asylum I think extradition for crimes takes precedence over the civil determination under the immigration laws.

Mr. HUGHES. Thank you. Thank you very much.

Mr. LUBET. Thank you.

Mr. HUGHES. The gentleman from Michigan.

Mr. SAWYER. I suppose it would follow that we could extradite and everything as being proffered as a citizen of a foreign country.

Mr. LUBET. Precisely.

Mr. SAWYER. So, it seems to me we could both grant them asylum on the one hand and extradite for a crime, just like you might extradite a citizen.

Mr. LUBET. Exactly. That is why there is no reason to stay the extradition pending the outcome of the asylum. You wouldn't stay extradition pending the outcome of a naturalization proceeding.

Mr. SAWYER. It is probably the most difficult thing to reconcile logically, and I recognize the problem is that these terrorist offenses which are, really, purely political in most of the cases where the PLO or some other organization bombs an Embassy or something, or Israel, and then you get extradition, they didn't even know any of the people, there was no aim to gain; it was purely a political end. And yet I guess none of us would very well condone refusing extradition in that kind of a case. But it puts kind of a hypocrisy, in a sense, over this whole political offense sort of thing. It's kind of a whose politics are being gored, in effect.

Mr. LUBET. Part of the problem is, I think, the name "political offense exception." If one could go back to 1833 and pick a new name for it, something other than political offense, that would probably be salutary, because the word political just covers too much territory. Political motivation, political association, political activity—and I think it has been recognized early on that political offense does not mean politically motivated offense but really it is a term of art meant to cover a much narrower range of activity. Unfortunately, our language doesn't have a synonym that immediately jumps to mind, except to say that no matter what side someone is on politically, it is possible to conceive of circumstances where you would want to see the criminal extradited.

If one is pro-Israeli, of course, or even not, the extradition of PLO people springs to mind. If one is pro-PLO you certainly wouldn't want to say that Allen Harry Goodman, the fellow who was just convicted of shooting up the mosque in Jerusalem, should, if he had escaped Israel, that they shouldn't have been entitled to extradite him to punish him. What is needed is to find some objective standard that is based on decency instead of politics, I suppose, and apply that across the board.

And I don't want to claim ultimate wisdom on this subject, but it strikes me that the current bill comes pretty close. It would gore my ox, I think, under certain circumstances. I'd have to live with that.

Mr. SAWYER. The big problem with that that bothers me—and I don't know that there is any answer to it, but you posed the scenario of Lech Walesa escaping from a prison in Poland, and maybe through necessity or in the process, killing a couple of guards, let's say, when he did. It would be rather difficult for me to visualize one of our courts granting extradition in that kind of case. On the other hand, if we had some Communist in England that was doing something that was deemed of the British to be very disruptive of their government or something, and he was put in prison, and the same thing happened, he killed a couple of guards and fled to the United States, it would be rather difficult to perceive of our not extraditing him. And yet, it's so highly subjective that the whole thing, I don't think you can get too legalistic



about looking at it. I just don't think it permits of that when you get into that political question.

Mr. LUBET. That is one reason to preserve executive flexibility in the application; it might well be that that decision is a distinction that we shouldn't ask a judge to make, and certainly one that we shouldn't ask 400 different judges to make, sitting all over the United States, but to centralize that sort of policy decision in the hands of the State Department.

Mr. SAWYER. I suppose we could even visualize that if a new government came to power in Poland, and was an anti-Communist government, and some Communists were imprisoned and doing the same thing as you envisioned Walesa, I assume that our approach might very well be quite the opposite on an extradition question. We might very happily send them back to the Polish Government. So, that's why I think we're kind of in agreement—I guess we're in agreement—in that in a more general and somewhat vague way we can meet these standards, and perhaps the better because they really won't stand too much analysis.

Mr. LUBET. I might articulate it differently, Congressman, and say the more objective we can make the standards for the courts, the better, leaving the subjective judgments to politics, which is, I'm sure you know as a Congressman, is a more subjective art than jurisprudence.

Mr. SAWYER. Thank you.

I yield back.

Mr. HUGHES. I worry about another aspect of it, and that is that under our Constitution, treaty-making responsibilities are for the President and for the Senate. And I operate on the premise, first of all, that we should not have treaties, or we should be looking at revising treaties, with those countries that don't have good human rights records, where there would be the type of violations that would give us that type of fear. And it would permit every court throughout this land to make decisions on that issue, so that, in effect, you are undercutting the treaty commitments, where we promised to extradite defendants, under certain circumstances.

Mr. LUBET. That's right, Congressman. I would go further and say that the existence of a treaty is evidence of the fact that an investigation has been made by the political branches of government, that the country is a legitimate treaty partner, one which can be trusted to fulfill its international obligations; that treaty hasn't just been negotiated by the President but it has been ratified by two-thirds of the Senate and ought to be entitled to great weight on the questions of due process and humane treatment which, after all, are precisely the ones that are going to be considered in negotiating the treaty.

Of course, it is true that governments change and treaties remain in force and are binding upon successor governments. So, the situations will arise where the existence of a treaty can't be conclusive of the issue of fair treatment, or humane treatment, or due process, because of changing world events.

Mr. HUGHES. Well, when they change we have the opportunity to renegotiate the treaty.

Mr. LUBET. We have the opportunity to renegotiate the treaty or, I suppose, even abrogate it.



Mr. HUGHES. Abrogate it.

Mr. LUBET. But we also have the opportunity, far short of that, for the Secretary of State to say, "This is a political crime and I will not allow extradition"; which is a better approach because it preserves for us the opportunity to extradite to the United States.

And I understand, from what Mr. Abbell, who is present in the room today, from a previous conversation, that we get a lot more than we send, that we receive more criminals than we extradite, and that, therefore, our interest is definitely in maintaining treaties with as many countries as possible. And if the placement of discretion in the executive will allow us to have more treaties, while still denying extradition in appropriate cases, that has got to be, on balance, a plus to the United States.

Mr. HUGHES. Do you think that it's getting into our balance of trade?

Mr. LUBET. I don't know the answer to that question.

Mr. HUGHES. Thank you, Professor. Only joshing. You've been most helpful. Once again, we appreciate it.

Mr. LUBET. Thank you.

Mr. HUGHES. Our final witness today is Waldemar Solf, who is senior professor at the Washington College of Law, The American University, here in Washington. He has had a long and distinguished career with the U.S. Army, with the Judge Advocate General as a military judge and as a member of several U.S. delegations to conferences on international laws. He has received several awards from the military, including having a chair for international law named in his honor by the Judge Advocate General's Office. He has published extensively on matters relating to international law and is a member of various committees on international law. Although he is not representing the American Bar Association today, he is chairman of the ABA's International Criminal Law Committee of the Section of International Law and Practice. In that capacity he has been extensively involved in making recommendations to the ABA on how the extradition laws of this country should be reformed.

Mr. Solf, we've received your statement, and without objection it will be made a part of the record. And we hope that you, likewise, will be able to summarize for us.

Welcome.

#### TESTIMONY OF WALDEMAR A. SOLF, ADJUNCT PROFESSOR OF LAW, WASHINGTON COLLEGE OF LAW, THE AMERICAN UNIVERSITY

Mr. SOLF. Thank you very much, Mr. Chairman. It is, indeed, a great pleasure for me to appear on the subject to which I've given some thought in the last couple of years.

I think your committee has produced an outstanding bill, which really will effect much needed reform in American extradition practices and procedure. I'd like to extend my sincere congratulations on the excellent job that you have done.

I intend to limit my remarks to the list of acts which are not political offenses, in subsections 3194(e) (2) and (3). The sense I have gotten from the testimony of all the witnesses so far, and your re-

marks, is an appreciation of a fact that there are limits to violence, even if they are politically motivated; usually called terrorisms, these go beyond any tolerable concept of what might be included within the political offense exceptions.

Mr. Chairman, I noted that in your statement of last week you cautioned that "we must be careful that in excluding certain conduct from the political offense definition we do not also exclude other conduct that has traditionally been encompassed within the meaning of the term." I would like to corrolate this bill with the law applicable in armed conflict, particularly the 1949 Geneva Conventions. Within their scope is common article 3 which deals exclusively with noninternational armed conflicts. There are now 154 parties to the conventions which makes article 3 the most widely ratified and applicable human rights treaty in existence.

Now, the history of the political offenses exception indicates that it was invented in the 1840's to shield from extradition participating combatants of the nationalist democratic revolutions and civil wars that swept Europe and the Americas in the mid-19th century. The primary beneficiary of relative political offenses was the combatant in the internal armed conflict. Pure political offenses such as treason, sedition, political dissent, just are not in any extradition treaty to which the United States has ever been a party; and, so, it is irrelevant to even talk about them.

The offenses we are concerned with are those common crimes which happen in a political context. Now, I am afraid that subparagraph (A) and (B) of subsection (e)(3), as now drafted, erode the benefit of that exception for the normal participant in a noninternational armed conflict. After all, there is nothing extraordinary about killing a combatant in battle, capturing a combatant in a conflict situation, or the use of firearms in a civil war. The ambiguity of those provisions could be corrected by making it clear that the conduct which violates the internationally established norms applicable in noninternational armed conflicts is not a political offense, but that warlike acts of combat such as killing, wounding, or capturing of an enemy combatant or the use of firearms against an adversary should remain within the exception even though the victorious government's law considers these acts to be murder, maiming, kidnapping, or assault with a dangerous weapon.

This formula should be limited to situations of armed conflict. We ought not to draft any provision in such a way as to make a police or military personnel fair game for violence by dissidents or terrorists in situations falling short of armed conflict.

I think the balancing test of the extraordinary circumstances clause is adequate, in situations falling short of armed conflict, to accommodate the meritorious case where violence is justifiable in defense of fundamental human rights. I think we may have more problems with hijacking.

The State Department can inform you more completely, but I believe that at least twice a year somebody hijacks an airplane out of East Germany or Poland into West Berlin. And, obviously, it would be unthinkable to extradite the individual. Of course, our treaty obligations are complied with, the airplane is immediately returned, other passengers and crew who do not wish to seek asylum in West Berlin are returned promptly. But we comply with our treaty obli-

gations in those instances by subjecting the hijacker to a trial in the West Berlin courts. At one time we established the United States Court for Berlin to try a group of these hijackers. Sentences were not very severe, but we did comply with our treaty obligations.

I hope that there is nothing in your bill, sir, that would preclude the United States from trying an offender in its custody where we have an obligation to either submit the prosecution or to extradite. I didn't think that there was that difficulty, but it is well worth examining this matter further.

Now, in order to make the proposal which I have made—and you will find it on page 15 of my prepared statement—it is necessary to define “armed conflict” for the limited purposes of this legislation. Now, at this time the United States and 153 other countries are bound by common article 3 to the 1949 Geneva Convention. This article prescribes basic norms for the protection of persons not taking an active part in the hostilities, or no longer taking an active part in hostilities. It doesn't define the term “armed conflict,” because it was not possible to achieve a consensus on any definition. Lack of definition has made it possible by states affected by insurrections or revolutions to deny that the bloodshed taking place in their territory amounts to an armed conflict. France did not consider the Algerian rebellion to be an armed conflict until very late in the war. Pakistan did not consider the Bangladesh secession to be an armed conflict until quite late. And the United Kingdom does not consider what is happening in Northern Ireland to be an armed conflict.

In 1977, two Protocols were adopted to the 1949 Geneva Convention, one dealing with international armed conflicts and the other one with noninternational armed conflicts. The United States hasn't ratified either of these protocols yet.

The protocol dealing with noninternational armed conflicts, protocol II, supplements and elaborates the simple norms of common article 3 by adding considerable detail and by adapting several sophisticated provisions for the protection of civilian population against the effects of hostilities. It presupposes that the dissident rebel side has sufficient state-like characteristics to enable them to conduct sustained, and concerted military operations and to implement the fairly sophisticated standards subscribed for humane treatment of detainees, a court system, and highly organized medical care system. If we ratify protocol II, that will provide its own definition and threshold.

In the draft amendment I have prepared for your consideration, I suggest that the threshold of an armed conflict to which common article 3 applies to be that: the armed forces of the state be committed against dissident armed forces or other armed groups, not merely the civil police; that these dissident armed groups or armed forces be linked to a party to the conflict; that they be organized; and that they be under command responsible to the party to the conflict for its the conduct of subordinates.

The text proposed for your consideration, also supplies a negative test which appears in 1977 Protocol II to the effect that the term “armed conflict” does not apply to situations of internal disturb-



ances and tensions such as riots, isolated, sporadic acts of violence, and other acts of a similar nature.

In this connection it is desirable to compare and distinguish very briefly how modern international law treats and distinguishes between international and internal armed conflicts. The normative restraints with respect to the treatment of persons in the power, of one or the other, of the parties of the conflict, are roughly similar. The fundamental human rights protected are roughly comparable. Procedural safeguards with respect to penal sanctions are roughly comparable. The care of the wounded, sick, and shipwrecked is roughly comparable. And the 1977 Protocol II also gives comparable protection to the civilian population against the effects of attack.

There are two significant differences and they are highly relevant to the bill under consideration.

First of all, the international rules applicable in internal armed conflict don't make any reference to prisoner-of-war status or the combatants' privilege. Common article 3 to the Geneva Convention, in fact, provides that the application of humanitarian rules does not affect the legal status of the parties.

Now, in an international armed conflict, it is well established that a combatant who fights, kills and performs other acts of violence, is immune from the criminal jurisdiction of his adversary for any of his warlike acts so long as his acts do not violate the law of armed conflict. He is of course, subject to their criminal jurisdiction of war crimes.

International law does not, however, require such combatants' privilege or prisoner-of-war status in a civil war. And in a civil war or other noninternational armed conflict, in theory at least, the rebels are guilty and subject to prosecution for treason. Every one of their acts of violence happens to also be violation of the municipal criminal law for homicides, kidnaping if prisoners are taken, and so forth.

Now, this happens within the context of the domestic law where a conflict is taking place. When, a combatant gets out of the country and seeks refuge in a third state, the situation changes somewhat. Third states do recognize a qualified combatant's privilege in regard to granting asylum and applying the political offense exception. France, for example, has a special statute on the subject, enacted in 1927, which provided that "acts committed in the course of an insurrection or civil war in furtherance of the purposes of one or the other of the parties—is not extraditable unless these acts constitute acts of odious barbarism or vandalism prohibited by the laws of war, and not until the civil war is ended." The Weimar Republic, in 1929, provided that extradition is permissible if acts constitute a deliberate offense against life, unless committed in open combat.

I'd like to also bring up again, the subject of the 1967 protocol concerning the status of refugees, concerning which Professor Lubet and other witnesses spoke. They considered it entirely from the standpoint of granting asylum under our immigration laws.

There is one provision of the 1967 protocol which is directly relevant to the issue of extradition, and, which is relevant to political offense exceptions. Article 33 of that protocol; and of the conven-



tion the status of refugees prohibits the expulsion or delivery of a refugee to the border of a state where the individual has a well founded fear of persecution because of his race, religion, political opinion, and so forth. Now, there is nothing in the protocol that requires any state to grant asylum. There is a prohibition, however, against the delivery of the individual to the border where he is likely to be persecuted.

Under the terms of the protocol, that protection specifically does not apply to persons who are charged with war crimes or serious nonpolitical offenses. In other words, political offenses come within the scope of the nonrefoulement provision of that 1967 protocol. So, I believe that if a particular offense is found to be a political offense, it would be a violation of article 33 of the protocol to extradite the individual. This is another instance where third state practice under transnational law takes into consideration, a qualified combatant's privilege with respect to civil wars.

The second important distinction between international and non-international armed conflicts in the law with respect to international armed conflict is replete that with provisions for their enforcement including an obligation to either try or extradite for grave breaches of the Geneva Conventions. However, the law applicable to noninternational armed conflicts is almost totally silent in this regard. If an individual is extraditable pursuant to a treaty, it has to be under a bilateral extradition treaty or some other treaty, not by virtue of the Geneva Conventions or its additional protocols. There is one exception; the taking of hostages.

Taking of hostages is specifically prohibited in common article No. 3, and it is prohibited throughout the Geneva Conventions. It is a grave breach of the Geneva Conventions, when Burongy is a protected civilian in an international armed conflict.

Now, the 1979 Convention Against the Taking of Hostages overlaps the law of armed conflict and provides for a very strong extradite or prosecute formula for any taking of hostages in violation of the Geneva Conventions if the Geneva Conventions do not, in themselves, include the obligation to try or extradite.

Now, I notice that you have the taking of hostages in the second category of offenses which are subject to the extraordinary circumstances clause. I would recommend that you give some consideration to moving that into the absolute category; the hostages treaty is not yet in effect. It becomes effective when 22 states have ratified it. Twenty have; the U.S. Senate has given its advice and consent, and the only reason we have not deposited our instrument of ratification is that we are waiting for implementing legislation. I think that if you make this an absolute nonpolitical offense you would go a long way toward providing the implementing legislation that is required.

MR. HUGHES. Mr. Solf, I think you've made some excellent points with regard to noninternational conflict combatants and the taking of hostages. I wonder if you could just briefly direct yourself to the question of noninquiry, and let us hear a little bit about your view on whether the courts are capable of making decisions that a person should not be extradited because the request isn't properly motivated.

Mr. SOLF. Well, I can be very brief on that one. I concur completely in Professor Lubet's testimony as to that issue.

Mr. HUGHES. In fact, was there anything that you disagree with Professor Lubet on?

Mr. SOLF. Is there anything I disagree with on that?

Mr. HUGHES. Any of the statements.

Mr. SOLF. Well, not really. He did suggest that we make grave breaches of the Geneva Conventions specifically absolute nonpolitical offenses. I would certainly share with him in that view except for the fact that, in subsection (d), I thought took care of it.

Mr. HUGHES. But you agree that the rule of noninquiry should remain as it is presently constituted?

Mr. SOLF. Yes, indeed.

Mr. HUGHES. The current practice has worked fairly well.

Are you aware of any situation where defendants have been extradited where they suffered oppression, or acts of violence, when they were returned to the requesting jurisdiction?

Mr. SOLF. No, I do not.

The other day you asked whether the rule of speciality ought to be incorporated specifically. And that I think would be of some help in connection with that concern; because under the rule of speciality, the extradited person is delivered. He's there for only one purpose, and that is for trial for the criminal——

Mr. HUGHES. That particular offense.

Mr. SOLF. Yes.

And I think that specifying the rule of speciality might give a little emphasis to that point.

Mr. HUGHES. I see. Thank you.

Would the gentleman from Michigan have any comments?

Mr. SAWYER. No.

Mr. HUGHES. Well, thank you very much. Your statement was very comprehensive, very helpful.

Mr. SOLF. Thank you.

Mr. HUGHES. And you've made a number of recommendations that we appreciate.

Mr. SOLF. Thank you very much.

Mr. HUGHES. Thank you.

[The statement follows:]

SUMMARY OF PREPARED STATEMENT BY WALDEMAR A. SOLF ON H.R. 2643, THE  
EXTRADITION ACT OF 1983

H.R. 2643 would effectively reform and modernize U.S. international extradition practices and procedures. I would like to suggest a change to Subsections 3194(e) (2) and (3) in order to align the offenses which are not to be considered as political offenses with the norms established by International Law applicable in armed conflicts.

Subsection (e)(2) lists the offenses which are not political offenses for purposes of extradition under any circumstances and thus, effectively exclude all acts of terrorist violence prohibited under multilateral treaties intended to deter and punish international terrorism. Subparagraph (D) would also exclude grave breaches of the 1949 Geneva Conventions which obligate the parties to prosecute or to extradite alleged offenders in international armed conflicts. Combatants in such a conflict enjoy the "combatants' privilege" which gives them immunity from the criminal jurisdiction of their captors for warlike acts which do not transgress the law of armed conflicts. In internal armed conflicts, however, there is no obligation to accord the privilege or PW status to the adversary's combatants.

Subsection (e)(3) lists other violent offenses which are not political offenses except in extraordinary circumstances. It would exclude other acts of terrorist violence which are not the subject of multilateral treaties; but, unless qualified more precisely, subparagraph (A) (homicides and other violent acts) and (B) (use of firearms) could be construed as excluding from the scope of the exception all acts of violence by combatants of the losing side in a non-international armed conflict. This could occur even when the violent acts do not violate the internationally established norms applicable in non-international armed conflicts.

The "extraordinary circumstances" clause provides sufficient flexibility to permit courts to balance competing interest in determining whether acts of politically motivated violence fall within the exception in situations falling short of armed conflict. But as there is nothing extraordinary about killing an adversary or the use of firearms in a civil war, the test is not useful in an armed conflict situation.

Subsection (e)(3) should be revised to preclude the application of the political offenses exception to offenses which constitute breaches of the norms established under international law applicable in non-international armed conflicts, without subjecting to extradition combatants for warlike acts which do not transgress these norms.

A proposed amendment intended to accomplish this recommendation is attached at page 16 of my prepared statement.

## STATEMENT OF WALDEMAR A. SOLF

ON

H.R. 2643

THE EXTRADITION ACT OF 1983

BEFORE

THE SUBCOMMITTEE ON CRIME COMMITTEE ON THE JUDICIARY

HOUSE OF REPRESENTATIVES

MAY 5, 1983

Mr. Chairman, Members of the Committee:

Thank you very much for the opportunity to testify today concerning H.R. 2643

My name is Waldemar Solf. I am an Adjunct Professor of Law at the Washington College of Law, The American University. I teach a course on "International Humanitarian Law" which covers the law for the protection of victims of armed conflict and the rules governing the conduct of hostilities. Prior to my retirement from the Government in 1979, I was the Special Assistant to the Judge Advocate General of the Army for Law of War Matters and also served as Chief of the International Affairs Division in the Army Judge Advocate General's Office. From 1974 to 1977, I was a member of the U.S. Delegation to the Diplomatic Conference on International Humanitarian Law Applicable in Armed Conflict which prepared two protocols undating the 1949 Geneva Conventions. Protocol I deals with the rules applicable in International Armed Conflicts; Protocol II deals with those applicable in Non-International Armed Conflicts such as civil wars.



I have recently co-authored a commentary on the 1977 Protocols entitled "new Rules for Victims of Armed Conflicts."

I am Chairman of the International Criminal Law Committee of the ABA section on International Law. I wish to make it clear, however, that I am testifying solely in my individual capacity; the A.B.A. has not yet taken a position with regard to these issues.

I intend to limit my comments to Subsection 3194(e)(3) which provides legislative guidance to the courts as to offenses which are not political offenses for purposes of extradition, "except in extraordinary circumstances." In particular, I will comment on how this Subsection relates to the law of armed conflict, and to invite your attention to a serious flaw which goes much further than merely removing terrorist violence, whether committed in time of peace or armed conflict, from the ambit of the political offenses exception. They would also remove all acts of violence committed by combatants in a non-international armed conflict from the exception, even as to acts which would universally be regarded as legitimate acts of war had they been committed in an international armed conflict.

This would come very close to doing away with the political offenses exception, except as to those purely political non-violent acts which are so obviously political that they never appear in an extradition treaty of the U.S. In a sense, two provisions of the Subsection (Subparagraphs A and B), throw out the baby with the bath water.

I have no complaint with the effect of this Subsection in relation to international armed conflicts which is affected by Subparagraph (e) (2) (D). This provision excludes the political offenses exception as to any offense within the scope of a treaty which obligates the United States to either extradite or prosecute a person accused of the offense. This applies not only to the offenses listed in Subparagraphs (A) to (C) but also to grave breaches of the 1949 Geneva Conventions.

Each of the four 1949 Geneva Conventions obliges the contracting parties:

a. To enact any legislation necessary to provide effective penal sanctions for persons committing or ordering to be committed, any of the grave breaches defined therein.

b. To search for alleged offenders of such grave breaches, and to submit them for prosecution before its own courts, regardless of their nationality; or, in accordance with its own legislation, to extradite them to another contracting party concerned, provided the requesting party has made out a prima facie case. (Common Articles 49/50/129/146).

As there are now 154 parties to the 1949 Geneva Conventions, grave breaches denounced therein are universal crimes subject to the jurisdiction of each party to the conventions. They would be extraditable offenses, not subject to the political offenses exception, under the proposed standard of HR 2643, Section 3194(e) (2) (D) which prescribes that an offense with respect to which a treaty obligates the United States to either extradite or prosecute a person accused of an offense, is not a political offense.

A summary of the grave breaches of the four 1949 Geneva Conventions is at Annex A.

Subparagraph D would also cover many other multilateral treaties and those which may become effective in the future, such as the 1979 Convention in Against the Taking of Hostages. It is an extremely useful provision which would obviate the necessity of amending this legislation as the network of treaties against international terrorism and other international offenses expands. It would thus apply to grave breaches of the 1977 Protocol I to the 1949 Geneva Convention Relating to International Armed Conflict if the U.S. ratifies this protocol. It would not, however, apply to breaches of Protocol II relating to non-international armed conflict. That protocol includes neither an obligation to prosecute nor to extradite.

In international armed conflict, prisoner of war status flows from the combatant's privilege. Those who are entitled to the juridical status of "privileged combatant" are immune from criminal prosecution for those warlike acts which do not violate the laws and customs of war but which might otherwise be common crimes under municipal law. This is a concept recognized by the classic publicists, including Belli, Grotius, Pufendorf, and Vattel. It was recognized in Article 57 of the Lieber Instructions of 1863, which states that "[s]o soon as a man is armed by a sovereign government and takes the soldier's oath of fidelity, he is a belligerent; his killing, wounding, or other warlike acts are not individual crimes or offenses." Under the law of the United States, any killing while on combat operations

which is not violative of the laws of war is recognized to be justifiable homicide. Civil law courts recognized this concept in the post-World War II trials when they provided immunity to those defendants charged with violations of domestic criminal law if it was established that their acts were privileged under international law.

In view of the clear distinction between grave breaches of the Geneva Conventions and legitimate acts of combat by privileged combatants, the standards developed in HR 2643 can be applied without difficulty as to acts of violence performed in the course of an international armed conflict. Grave breaches are not political offenses; legitimate acts of combat are not offenses at all and thus do not come within the scope of extradition treaties.

Acts of violence occurring in the course of a non-international armed conflict (insurrection, rebellion or civil war) pose a more difficult problem. Although the 1949 Geneva Conventions and the 1977 Protocol II establish normative humanitarian rules applicable in non-international armed conflict (Annex B), they do not provide for any enforcement measures. Moreover, they do not oblige states affected by an internal armed conflict to recognize the combatants' privilege or to accord prisoner of war treatment to captured combatants of the other side.

For self-evident reasons, governments (particularly those which may be affected by an emerging dissident or separatist movement) are unwilling to concur in any international law which



would, in effect, repeal their treason laws and confer on their domestic enemies a license to kill, maim or kidnap their security personnel and destroy their security installations, subject only to honorable detention as prisoners of war until the conclusion of the internal armed conflict. They fear that any international rule establishing the combatants' privilege and prisoner of war status in internal armed conflicts would tend to encourage insurrection by reducing the personal risks of rebels. It follows that within the scope of domestic law of a country affected by such an armed conflict, the rebels have committed treason and their acts of violence may be punished as common criminal offenses.

As a matter of policy, States sometimes apply international armed conflict practices to a civil war and are generous with amnesty in order to facilitate a restoration of peace, or in a prudent expectation of reciprocity; but international law does not require such a policy except with respect to recognized belligerency, a rare event in the second half of this century.

Because common Article 3 of the 1949 Geneva Conventions are the Conventions' only articles relating to non-international armed conflicts, none of the provisions of the conventions relating to enforcement, including the prosecute or extradite provisions are applicable to the norms of Article 3. It follows that the only basis for extradition under U.S. law for offenses violative of Art. 3, are the various bilateral extradition treaties relevant to common crimes. These are subject to the political offenses exception. Indeed the political offenses

exception was invented in 1840 for the purpose of shielding from extradition the participants in the liberal and nationalistic revolutions which occurred in mid-19th century Europe and the Americas.

Although there is no mandatory combatants' privilege and prisoner of war status or treatment in internal armed conflicts within the scope of any nation's municipal law, a qualified combatants' privilege has been recognized by third states in matters relating to asylum and extradition. The dichotomy between the state of municipal law and transnational practice in this regard was vividly expressed by Sir James Stephen in his explanation of the British Extradition Act of 1870:

[I]f a civil war were to take place, it would be high treason by levying war against th Queen. Every case in which a man was shot in action would be murder. Whenever a house was burnt for military purposes arson would be committed. To take cattle, . . . by requisition would be robbery. According to the common use of language, however, all such acts would be political offences, because they would be incidents in carrying on a civil war. I think, therefore, that the expression in the Extradition Act ought (unless some better interpretation of it can be suggested) to be interpreted to mean that fugitive criminals are not to be surrendered for extradition crimes, if those crimes were incidental to and formed a part of political disturbances." (J. Stephen, A History of the Criminal Law of England (1883), Vol II, at 70-712.

This reasoning was applied in the case of In re Castioni [1891] 1 Q.B. 149, 167 which became the leading influence on the application of the political offenses exception in American courts.

The difficulty with the simple formula of the Castioni case is that it did not recognize that there are limitations on the conduct of internal armed conflict and that revolutionary or counter revolutionary violence which transgresses these limitations is not tolerable under the political offenses exception. Moreover, every political disturbance does not provide justification for violent criminal acts.

A 1927 French law comes much closer to the recognition of these limitations. It provided:

[Extradition is not granted] when the crime or offense has a political character or when it is clear [resulte] from the circumstances that the extradition is requested for a political end.

As to acts committed in the course of an insurrection or a civil war by one or the other of the parties engaged in the conflict and in the furtherance. . . of its purpose, they may not be grounds for extradition unless they constitute acts of odious barbarism and vandalism prohibited by the laws of war, and only when the civil war has ended." (Law of March 10, 1927, Tit. 1, Art. 5, para. 2, as quoted in Hannay, International Terrorism and the Political Offense Exception to Extradition, 18 Columbia Journal of Transnational Law, 381, 386 (1979).

Similarly, Article 37 the 1967 Protocol relating to the Status of Refugees (606 U.N.T.S. 267, 19 U.S.T. 6223) which prohibits the expulsion or return of a refugee to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality or membership of a particular social group or political opinion, does not apply to persons with respect to whom there are serious reasons for considering that he has committed a war crime or a serious non-political crime (Arts. 2F, 33).

The gap between normative prohibitions and measures of enforcement in the 1949 Geneva Conventions and its Protocols is plugged with respect to hostage taking by the 1979 Convention Against the taking of Hostages. (Senate consent completed, but treaty not yet in effect pending U.S. implementing legislation and ratification of 2 more states to make the required 22 parties).

Common Article 3 and Article 4 of Protocol II prohibit the taking of hostages in a non-international armed conflict. Article 75 of Protocol I which lays down fundamental human rights for persons who do not qualify as "protected persons" also prohibits this act. But the grave breach of the Fourth Convention applies only to "protected" civilians in the power of an adverse party in an International armed conflict. The effect of Article 12 of the 1979 hostage convention, however, is to make the Hostage Convention with its very strong prosecute or extradite provisions applicable to acts of hostage taking in armed conflicts, whenever the Geneva Conventions and its Protocols do not establish the obligation to submit for prosecution or to extradite.

In view of the practice of states in regard to applying the political offenses exception to normal combat activities occurring in a non-international armed conflict occurring in another country, the provision on HR 2643, which excludes all acts of violence from the benefits of the exception, should be modified.

Subparagraphs (e) (3) (A) and (B) exclude almost any offense involving violence from the ambit of the political offense exception including any offense involving the use of firearms. It thus excludes virtually all of the "relative political offenses," i.e., an offense which comprises the elements of a common crime but which is so closely related to political activity that its political nature warrants protection from extradition. Thus these two subsections would bar any violent acts of terrorism from the benefit of the exception, but insofar



as it would involve homicides, assault with intent to commit serious bodily harm, kidnapping, or the use of firearms, it would deny the protection of the exception to the participants in a non-international armed conflict (insurrection, rebellion or civil war) for acts which would be universally considered to be legitimate acts of warfare had they been performed in an international armed conflict. These are precisely the situations for which the political offenses exception was invented in 1840 and for which it has been applied by the U.S. courts and the courts of other western democracies since that time.

The complaints of abuse in some American cases is that the courts have not always recognized that there are limits on the methods and means of violence which may be used in war time, and that they have applied the exception in cases of politically motivated violence in situations where the exception was never intended to be applied.

Modern conventional international law applicable in armed conflict has developed limitations on the methods, means, and measures of coercion and violence which may be used by the parties in any armed conflict, including a non-international one. Violent acts which transgress these norms ought not to be within the ambit of the exception. Similarly, terrorist acts of violence in situations falling short of armed conflict even when directed against the security forces of a state, such as those perpetrated by the Red Brigades of Italy or the Bader-Meinhoff gang of Germany and similar groups should also be excluded.

We should not, however, exclude the participants of a non-international armed conflict whose conduct has not transgressed the norms established by international conventions to which the U.S. is a party.

The report of the House Judiciary Committee on H.R. 6046 suggests that the "extraordinary circumstances" clause provides sufficient flexibility to permit the courts to balance competing interests in determining whether acts of combat violence fall within the exception. In relevant part, the report states:

An examination of the norms of international conduct during times of war and internal insurrection would be useful in determining whether the balance tips in favor of, or against, the existence of "extraordinary circumstances." (Report No. 97-627, Part I at p. 25).

The term "extraordinary circumstances" involves ambiguity as well as flexibility. There is, after all, nothing extraordinary about killing an adversary in battle, nor in the use of firearms in a civil war. Whereas it is proper for Congress to rely on the courts to balance the weight of competing standards in particular cases, the applicable standard should be defined when they are foreseeable.

It should be possible to formulate more precise legislative guidance which would:

- a. Exclude from the political offenses exception
  - (a) acts which violate the norms established under international law applicable in armed conflict; and,
  - (b) acts of terrorist violence, no matter how politically motivated, committed in circumstances

which do not amount to armed conflict, except in extraordinary circumstances

- b. Apply the political offenses exception to acts of combatants which do not transgress the norms established under international law applicable in non-international armed conflict.

There remains for consideration, the issue whether a particular situation amounts to an armed conflict.

The 1977 Protocol II applicable in Non-international Armed Conflict has a very high threshold. Under Art. 1, that Protocol (which includes rules regulating combat activities as well as basic human rights provisions) is applicable to armed conflicts:

" . . . which take place in the territory of a high Contracting party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol." (Protocol I, Art. 1(1)).

In view of the sophisticated provisions of Protocol II its implementation requires sufficient State like characteristics on the part of the rebels, as to suggest a level of organization and violence to be found in a classical civil war, where one might expect international armed conflict rules to apply, either under recognized belligerence or a prudent expectation of reciprocity.

Protocol II also establishes a negative limitation which is relevant to Common Article 3 (despite the express disclaimer that Protocol II does not modify its existing application). Art. 1(2) provides:

"This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts."

The term "armed conflict" is not defined in Common Article 3, mainly because no definition was able to command a consensus in the 1949 Geneva Conference. Presumably, in view of its basic minimum human rights provisions it should be much lower than the threshold for Protocol II. There is nothing in paragraph 1 of Common Article 3 which is not already demanded by the procedure of penal law of "civilized" states in relation to the treatment of common criminals.

Nevertheless, as the application of Common Article 3 acknowledges the existence of an "armed conflict" many states have refused to admit its application to insurgencies occurring in their territories. Thus, France refused to apply Common Article 3 until late in the Algerian war; Pakistan denied its applicability to the Bangladesh secession. The U.K. has never conceded that the troubles in Northern Ireland constitute an armed conflict, despite its declaration that an emergency exists threatening the life of the nation in justifying its derogation of certain provisions of the European Convention on Human Rights.

Insofar as foreign governments do not consider themselves bound to refrain from applying the combatants' privilege as it applies to extradition cases involving violent acts occurring in an internal armed conflict, it would seem that they are similarly not bound to follow the de jure government's determination as to whether an armed conflict exists for purposes of the political offenses exception.



It is therefore important that the legislation provide a definition of non-international armed conflict for purposes of the political offenses exception to extradition.

The threshold provision proposed for initial application consists of the minimum requirements that the dissident armed forces:

- a. be linked to a party to the conflict;
- b. be organized;
- c. be under a command responsible to the party to the conflict for the conduct of subordinates, and,
- d. that, the government's armed forces (rather than the civil police) be committed to suppress the insurrection.

It also uses the negative provisions of Protocol II to make certain that acts of violence against the police of a State in situations falling short of "armed conflict" do not benefit from the political offenses exception, except in extraordinary circumstances.

A proposed draft amendment intended to align the guidelines of H.R. 2643 with established norms of International Law Applicable in Non-International Armed Conflict is attached as Enclosure 1.

PROPOSED AMENDMENT TO H.R. 2643 98TH CONGRESS, EXTRADITION ACT OF 1983\*

"1. Insert a new subsection 3194(e)(2)(F) as follows:

"(F) an offense that consists of rape or the taking of a hostage."

Change the designation of subparagraph (F) to "(G)" and change the (E) in line 20 to (F).

2. Delete subsections 3194 (e)(3)(A) and (B) and substitute the following:

"(A) except for acts committed in the course of a non-international armed conflict, in furtherance of the objectives of the party to the conflict to which the person belongs and which do not violate the norms referred to in subparagraph (B),--an offense that consists of homicide, assault with intent to commit serious bodily injury, kidnapping, serious unlawful detention, or an offense involving the use of firearms (as such term is defined in Section 921 of this title) if such use endangers a person other than the offender;

(B)(i) an offense consisting of conduct which violates the provisions of subparagraph (1) of Article 3 Common to the Geneva Conventions of 12 August 1949 and any Protocol additional thereto Relating to the Protection of Victims of Non-international Armed Conflict to which the United States is a party.

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\*Intended to align the provisions relevant to the political offense exception to extradition with the norms of international law applicable in armed conflict.

"(ii) for purposes of this subparagraph a non-international armed conflict within the meaning of Common Article 3 to the 1949 Geneva Convention shall be an armed conflict which takes place within the territory of a foreign state between its armed forces and dissident armed forces or other armed groups which are under a command responsible to a party to the conflict for the conduct of its subordinates. The term 'armed conflict' does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature."

3. Delete subsection 3194(e)(3)(C).

Change the designation of subparagraph "(D)" to "(C)"; and change the references in line 19 to read "(A) or (B)."

In Article 6 of Protocol II, the minimum judicial guarantees which are "recognized as indispensable by civilized peoples" in Common Article 3 of the 1949 Geneva Conventions are particularized and spelled out as including:

- a. An independent and impartial court;
- b. procedure requiring that the accused be informed without delay of the particulars of the offense charged against him;
- c. procedures which afford the accused before and during his trial all necessary rights and means of defense;
- d. conviction may be based only on individual penal responsibility;
- e. prohibition of ex post facto liability or penalty;
- f. presumption of innocence;
- g. right of accused to be present at his trial;
- h. prohibition of compulsory self incrimination.
- i. requirement that convicted accused be informed of his judicial and other remedies;

In addition to the foregoing, Protocol II includes standards for humane treatment of persons deprived of their liberty for reasons related to the armed conflict (art 5); the care of the wounded, sick and shipwrecked (arts. 7-12); and the protection of the civilian population against direct attack and other effects of hostilities (Arts. 13-18).



- (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
- (2) The wounded, sick and shipwrecked shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

The standards of Common Article 3 have been extensively elaborated and particularized in the 1977 Protocol II. Relevant provisions are summarized as follows:

In addition to reaffirming all of the prohibitions of Common Article 3, Article 4 of Protocol II prohibits:

- a. Ordering that there shall be no survivors;
- b. Collective punishments;
- c. Acts of terrorism;
- d. Rape, enforced prostitution and any form of indecent assault;
- e. Slavery;
- f. Pillage;
- g. Threats to commit any of the prohibited acts.

## ANNEX B

INTERNATIONAL HUMANITARIAN LAW  
IN  
NON-INTERNATIONAL ARMED CONFLICTS

Without affecting the legal status of the parties to a non-international armed conflict, Common Article 3 of the 1949 Geneva Convention applies certain minimum human rights standards applicable to persons not; or no longer, taking an active part in the hostilities as follows:

## ARTICLE 3.

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

- (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;

The 1977 Protocol additional to the 1949 Geneva Conventions relating to the Protection of Victims of International Armed Conflict (Protocol I) adds several new offenses as grave breaches including:

--willful and unjustified acts or omissions which seriously endanger the physical or mental health of persons in the power of an adverse party, by medical procedures not indicated by the medical needs of that person, or not consistent with generally accepted medical standards, including mutilations, medical experiments, and removal of organs for transplantation. (Protocol I, Art. 11(4)).

--willfully causing death or serious injury to body or health by,

-making the civilian population the object of attack,

-launching an indiscriminate attack or an attack against works or installations containing dangerous forces (dams, dykes, nuclear electric power generating stations), knowing that it will cause civilian casualties, excessive in relation to the concrete and direct military advantage anticipate;

-making non-defended localities or demilitarized zones the object of attack and,

-the perfidious use of the Red Cross emblem (Protocol I, Art. 85).

The United States has signed, but not ratified, the 1977 Protocols which now are effective as to 22 states.

## ANNEX A

GRAVE BREACHES OF THE 1949 GENEVA CONVENTIONS  
AND  
1977 PROTOCOL I (INTERNATIONAL)

The grave breaches defined in the 1949 Geneva Conventions are the following, if committed in an international armed conflict against protected persons and objects:

--in the case of all four Conventions: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health;

--in the case of the First, Second and Fourth Conventions: extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

--in the case of the Third Convention: compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving him of the rights of fair and regular trial prescribed in the Convention;

--in the case of the Fourth Convention: unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed by the Convention, taking of hostages.

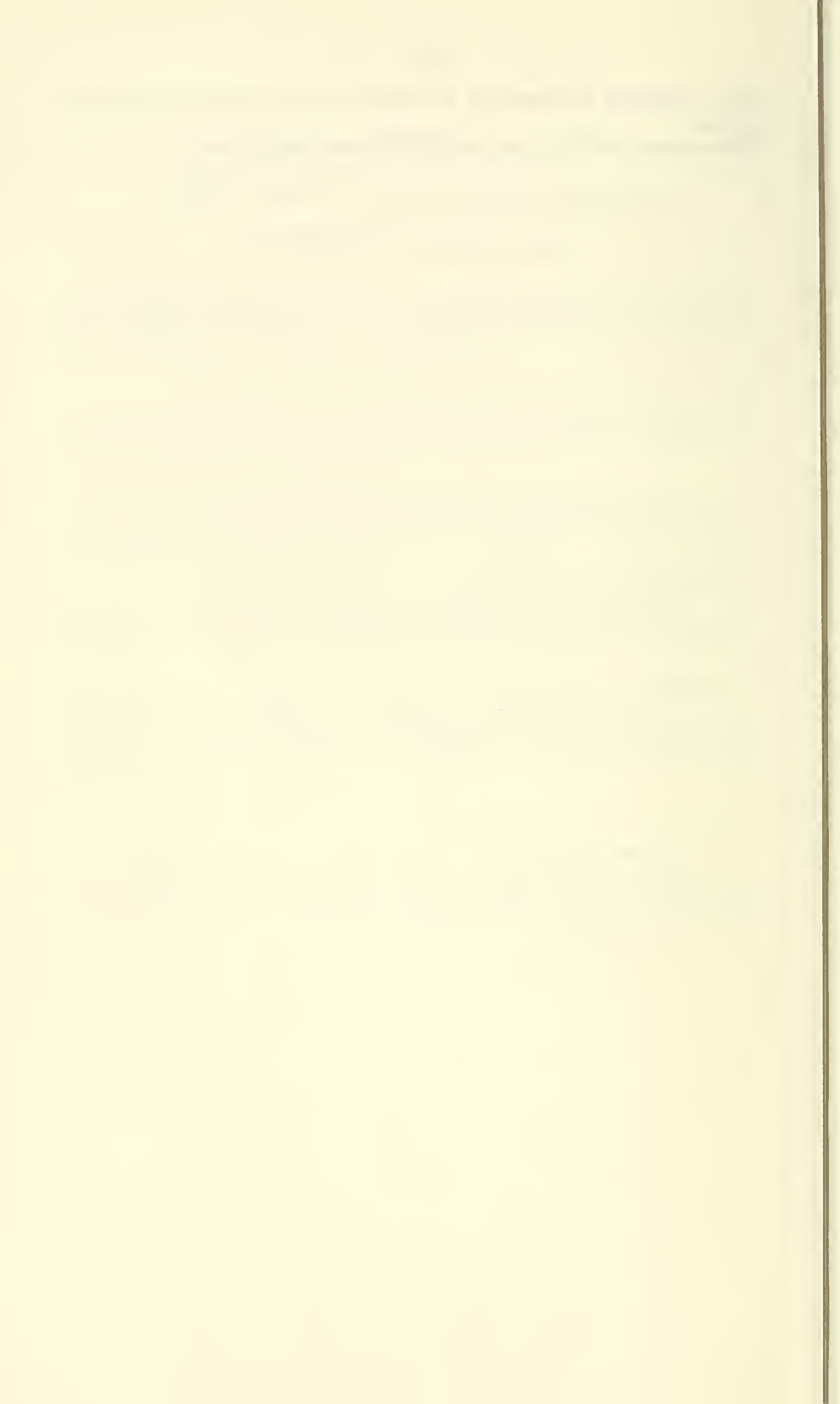
(Common Articles 50/51/130/147).

"Protected persons" within the meaning of the 1949 Geneva Conventions are the wounded, sick and shipwrecked persons of the armed forces, medical personnel, prisoners of war and civilians in the power of a party to the conflict of which they are not nationals, (Fourth Convention, Art. 4).



That concludes the hearing for today. The committee stands adjourned.

[Whereupon, at 4:10 p.m., the hearing was adjourned.]



## ADDITIONAL MATERIALS

DePaul University

College of Law

25 East Jackson Boulevard  
Chicago, Illinois 60604

312/321-7700

July 18, 1983

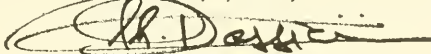
Ms. Virginia E. Sloan  
Assistant Counsel  
Subcommittee on Crime  
Committee on the Judiciary  
U.S. House of Representatives  
Washington, D.C. 20515

Dear Ms. Sloan:

Enclosed please find the manuscript of my article on the pending extradition legislation before Congress for inclusion in the published hearing of the Subcommittee on Crime held last month. You may wish to read it again since I have added some additional insights that may be of interest to you, particularly with respect to the rule of non-inquiry, re-extradition, and executive discretion.

I appreciate having the opportunity to participate in the Subcommittee's consideration of this important legislation. If I may be of any further assistance, please do not hesitate to contact me.

Sincerely yours,



M. Cherif Bassiouni  
Professor of Law

Enclosure

**THE 1983 EXTRADITION ACT:  
LEGISLATIVE HISTORY AND CRITICAL APPRAISAL**

by

**M. CHERIF BASSIOUNI  
PROFESSOR OF LAW  
DEPAUL UNIVERSITY**

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## 1. Introduction

On September 18, 1981 a draft extradition act entitled "The Extradition Act of 1981" was introduced before the U.S. Senate, 97th Congress, 1st Session.<sup>1</sup> On December 15, 1981, another draft extradition act entitled "The Extradition Reform Act of 1981" was introduced before the U.S. House of Representatives, 97th Congress, 2d Session.<sup>2</sup> Hearings were held in both the Senate<sup>3</sup> and House<sup>4</sup> on these bills, leading to their amendment and subsequent reintroduction.<sup>5</sup> The "1981 Extradition Act" was passed by the Senate<sup>6</sup> while the "1981 Extradition Reform Act" was not passed by the House. Since no House bill was passed, new legislation had to be introduced in the next session of Congress. On January 26, 1983 in the 98th Congress, 1st Session a new Senate Bill was introduced.<sup>7</sup> On April 20, 1983, in the 98th Congress, 2d Session, a new House bill was introduced.<sup>8</sup> The legislative process is once more underway, but because of the diversity between the Senate and House versions there is still an opportunity to reconsider during the "conference" between the Senate and House the different provisions of the contemplated Extradition Act.

This article will analyze the draft legislative texts intended to amend Title 18 U.S.C. sections 3181-3195. They are referred to herein as the "Act" when the provisions of the drafts are substantially the same, and are referred to as the Senate and House bills when their provisions differ. Any variances between the different Senate and House versions are noted in the footnotes. The Senate version in the text refers



to S. 1639 of 1981, S. 1940 of 1982 and S. 220 of 1983 with differences among them noted in the footnotes. The House version in the text refers to H.R. 5227 of 1981, H.R. 6046 of 1982 and H.R. 2643, with variance between the two included in the footnotes.

## 2. Legislative History

The existing legislation on extradition which is found in 18 U.S.C. sections 3181-3195<sup>9</sup> dates back to 1848.<sup>10</sup> In the subsequent 135 years (until 1983) the original 1848 Act has been amended in a piecemeal fashion ten times.<sup>11</sup> Thus the need to update this important legislation on which so much of the international penal cooperation of the U.S. depends.<sup>12</sup>

As indicated above, since 1981 a number of bills regarding extradition have been introduced before the Senate and House. In addition, the Administration though backing the Senate versions included similar draft legislation in other criminal law bills before the Senate.<sup>13</sup> The first version of the extradition "Act" was introduced in the United States Senate on September 18, 1981 as S. 1639<sup>14</sup> ostensibly in order "to modernize the statutory provisions relating to international extradition,"<sup>15</sup> though as will be discussed hereinafter it did not in the opinion of this writer achieve these far reaching objectives. The bill was entitled "The Extradition Act of 1981."<sup>16</sup> After hearings before the Senate,<sup>17</sup> the original version was amended and a "clean bill" introduced in the Senate on December 11, 1981 as S. 1940.<sup>18</sup> This "clean bill" version was reported favorably by the Committee on the

Judiciary with Committee amendments on April 15, 1982,<sup>19</sup> and was then referred sequentially to the Senate Committee on Foreign Relations on April 19, 1982.<sup>20</sup> Other than the "political offense exception," the Committee considered in a very cursory way other questions within its competence, and favorably reported the bill, with Committee amendments, on June 17, 1982.<sup>21</sup>

During this period, the House of Representatives was considering its own version of a new act to revise United States extradition law and procedure. H.R. 5227, the original House bill, was introduced on December 15, 1981, before the Subcommittee on Crime of the Committee on the Judiciary.<sup>22</sup> It was entitled "The Extradition Reform Act of 1981."<sup>23</sup> The bill "incorporated many of the suggestions of the Administration which [would be] . . . found in Senate bill S. 1940."<sup>24</sup> But in response to suggestions made at hearings on the bill and through written statements,<sup>25</sup> the House Subcommittee on Crime made significant improvements in the bill and approved an amendment in the nature of a substitution to replace H.R. 5227. The resulting "clean bill" H.R. 6046, entitled "The Extradition Reform Act of 1982," was favorably reported by the Committee on the Judiciary on June 24, 1982, with amendments;<sup>26</sup> on that date, it was sequentially referred to the Committee on Foreign Affairs.<sup>27</sup> That Committee however declined to entertain any amendments to provisions dealing with matters within its jurisdiction and favorably reported the bill without amendment on July 29, 1982.<sup>28</sup> The Committee's Report expressly

noted however that it favorably reported the bill without amendment "with the understanding that the members of the committee would be able to offer their amendments to the bill when it [would be] considered by the Committee of the Whole House."<sup>29</sup> Committee members' views were published as "Additional Views" in the Committee's Report.<sup>30</sup>

On August 19, 1982, the Senate, in accordance with Congressional rules, published its enacted version of "The Extradition Act of 1981" in the Congressional Record.<sup>31</sup> By error, the enacted bill published in the Record contained without distinction both the amendments adopted by the Senate Judiciary Committee and those adopted by the Senate Foreign Affairs Committee, which were contradictory on several important points, including the definition of the "political offense exception" and the court's jurisdiction to determine the applicability of the exception.<sup>32</sup> However, this was later corrected by an insertion in the Record to reflect that the Senate had enacted the bill as approved by the Foreign Relations Committee. This minor technical error was symptomatic of the limited and hurried attention given by these two Senate Committees to this important legislation.

Subsequently, the House was to have enacted its own version of the bill in September 1982 or in the "lame duck" session of November 1982, but it did not. On January 26, 1983, during the first session of the 98th Congress, a Senate bill was introduced before the Senate Sub-Committee on Crime Legislation (newly established as of the first session of the 98th

Congress) of the Committee on the Judiciary as S. 220, "The Extradition Act of 1983,"<sup>33</sup> which is almost identical to S. 1940 adopted by the Senate on August 12, 1982. On April 20, 1983, during the second session of the 98th Congress, a new House bill was introduced before the Sub-committee on Crime of the Judiciary Committee as H.R. 2643, "The Extradition Act of 1983,"<sup>34</sup> which is very similar both to its predecessor in the House, H.R. 6046, and to the new Senate bill, S. 220.

### 3. Historical Note

It is particularly interesting to note the historical similarity between the 1848 Act<sup>35</sup> whose structure remains in effect to date subject to the amendments referred to above<sup>36</sup> and the "Act" which is intended to replace it. The two reforms were prompted essentially by considerations arising out of the political aspects of extradition rather than its technical aspects. The 1848 Act can be traced to the landmark case of In re Robbins, decided in 1799.<sup>37</sup> In that case, President Adams granted England's request that the United States extradite an individual charged in England for a murder he allegedly committed while in the British navy. Robbin's defense was that he had been impressed into British service; he had escaped during the other crew members' mutiny in which the ship's officers had been killed. Many individuals in the United States perceived this to be a justifiable act for which punishment was wholly inappropriate, such that Robbins should not have been returned to England.<sup>38</sup> Although the exact term

"political offense exception" was not used at the time, the underlying concept was already recognized.<sup>39</sup>

The legal basis for Robbins' surrender was President Adams' order that he be arrested and returned to England. The federal district court sitting in Charleston, South Carolina in habeas corpus proceedings relied on the President's directions through the Secretary of State to review his order even though neither Jay's Treaty with England,<sup>40</sup> which was the treaty basis for the request, nor national legislation formed a legal basis for such action.<sup>41</sup> President Adams' decision in the highly publicized extradition of Robbins was one of the reasons attributed to his failure to be re-elected as President.<sup>42</sup>

The political controversy and legal irregularities of Robbins were not soon forgotten. In 1848, similar factors were brought to the forefront of public attention once more in the Metzger case,<sup>43</sup> which prompted Congress to enact the 1848 Extradition Act.<sup>44</sup>

The 1981-82-83 Acts have been prompted primarily by three highly publicized causes celebres in which the "political offense exception" was at issue: Matter of Mackin,<sup>45</sup> In re McMullen,<sup>46</sup> and Eain v. Wilkes.<sup>47</sup> In McMullen and Mackin extradition to England was denied on the basis of the political offense exception; in the Eain case, however, the exception was denied and the relator extradited to Israel.

The Department of Justice through some of its officials supported by others before the Senate and House made an in-



ordinate issue of these cases and regrettably, the motivations for the revisions of the U.S. extradition statute were presented to Congress on the erroneous assumption that the "political offense exception" has been interpreted or perceived to be a bar to effective extradition. This position was asserted by Administration representatives at hearings on the bills before both the Senate and the House,<sup>48</sup> wherein there was even the preposterous alarming warning that a continuation of such a trend would cause the United States to become a haven for terrorists.<sup>49</sup> This result is hardly likely as the "political offense exception" has so rarely been argued, let alone successfully argued in the U.S. as a basis for denial of an extradition request. In fact, it has been successful in only two cases in the last twenty years.<sup>50</sup> In addition, the "exception" is rarely used as a defense--in the last thirty years, there have been no more than some thirty reported cases having any bearing on the "political offense exception." During this same period of time however there have been between fifty and one hundred extradition requests per year raising a panoply of technical questions much more important to the administration of criminal justice and international cooperation in criminal matters than the rare "political offense exception."<sup>51</sup> These technical questions<sup>52</sup> however received little attention in the Senate, but more so in the House.

The fundamental controversy, giving rise to the 1848 Act and the 1981-82-83 "Acts," is the respective roles of the

executive, legislative and judicial branches in granting a foreign state's extradition request. The outcomes were however different in the two historic occasions. In 1848, the Act was designed to limit executive power such that President Adams' action in Robbins of ordering an individual's surrender would be impermissible. The underlying theory was that the judiciary should have the authority to review executive action such that fundamental individual liberty would not be improperly infringed. The 1981-82-83 "Acts" in the original Senate versions intended the opposite. The Administration has sought to expand the executive's authority to extradite individuals, on the theory that judicial review should not be allowed to interfere with the executive's authority to direct the United States' foreign relations, and to use extradition as a method of fostering friendly relations with foreign states.<sup>53</sup> This philosophic diversity is the essence of the difference between the Senate bills and the House bill with the Administration's view reflected in the Senate's more executive oriented approach.

The "Act" does not however fulfill all of the Administration's requests, although it does curb judicial discretion and review and the increasing safeguards of individual rights which have been more manifest in the last two decades of U.S. jurisprudence.<sup>54</sup>

The "Act" represents a technical improvement over existing legislation and is indeed needed to meet the contemporary exigencies of an expected volume of some 100 requests per year

in the 80's, and also in order to settle some questions that the judiciary had been wrestling with for years due to the lack of clear legislative mandate. Yet it leaves many open questions that it shifts to the judiciary for future interpretation. The "Act" however in many respects does no more than codify existing jurisprudence.<sup>55</sup> More could have been done that was not, and an opportunity which waited 135 years was not fully utilized.

#### 4. Structure of the "Act"

Both the Senate and House versions are similarly structured according to the general format of sections regarding: (1) general requirements; (2) the complaint stage; (3) the waiver stage; (4) the hearing stage; (4) the appeal stage; (5) the surrender stage; (6) the receipt stage; (7) definitions and general provisions. This general format was established in the 1981 Extradition Act embodied in the Senate bills and was followed by the House Judiciary Committee in their bills.

The specific structures of the Senate and House versions, respectively, are as follows:

##### 1. Senate Versions:

#### CHAPTER 210 - INTERNATIONAL EXTRADITION

Sec.

3191. Extradition authority in general.

3192. Initial procedure.

3193. Waiver of extradition hearing and consent to removal.

3194. Extradition hearing.

3195. Appeal.

3196. Surrender of a person to a foreign state.

- 3197. Receipt of a person from a foreign state.
- 3198. General provisions for chapter.<sup>56</sup>

## 2. House Versions:

### CHAPTER 210 - INTERNATIONAL EXTRADITION

- Sec.
- 3191. General statement of requirements for extradition.
- 3192. Complaint and preliminary proceedings.
- 3193. Waiver of hearing.
- 3194. Hearing and order.
- 3195. Appeal from determination after hearing.
- 3196. Surrender of a person to a foreign state after hearing.
- 3197. Cooperation with transit through United States for foreign extradition.
- 3198. Receipt of a person from a foreign state.
- 3199. Definitions and general provisions for chapter.<sup>57</sup>

The provisions of the "Act" are divided and subdivided ostensibly according to the various stages of the extradition process. But in fact there is a great deal of commingling of substantive and procedural aspects in the same provisions and other confusing aspects in the organization of the subject. For example, the substantive requirements for extradition are scattered throughout the "Act." A particular anachronism appears in Section 3199 of the House version; although its title indicates that it pertains to definitions and general provisions, it also contains a detailed subsection regarding bail<sup>58</sup> which properly belongs in a separate section or at least in Section 3192 entitled "Complaint and Preliminary Proceedings." The confusion of procedural and substantive

matters in the "Act" results in a lack of clarity and organization which could have been avoided easily had the "Act" been differently structured. But the reason is essentially due to a divergence in perspective. The Senate versions favored by the Administration were intended to be procedural, leaving all substantive questions to treaties which the Administration can negotiate with much more leeway. The House versions on the other hand sought to limit this approach and provide more uniformity in the substantive aspects of the practice.

##### 5. Relationship Between the Legislation and Treaties

The relationship between legislative provisions and treaty provisions is of fundamental importance in U.S. extradition law and practice because of the Constitution and the relationship between treaties and legislation.<sup>59</sup> Basically, this relationship can take either one of two forms: (1) the legislation can serve as the basis for all or most substantive and procedural matters while treaties include exceptional matters not included in the legislation; or (2) the legislation can serve as a supplement to treaties such that all substantive and procedural matters are regulated primarily by treaties rather than by the legislation. The "Act" is a hybrid of both.

The distinction between these two possible relationships has important ramifications. If the former approach is followed, then national legislation would be controlling with respect to all extradition matters and would regulate its substance and procedure. Treaties would be the exception;



that is, they would regulate matters not included in the legislation or negotiated in the treaty as an exception to the legislation. If the latter approach is followed, however, then national legislation would not be the general rule. Instead, every treaty would become a separate substantive and procedural statute more or less similar to or different from the legislation. The result of that approach would be to have as many sets of norms applied by the courts as there are treaties and there are at present 96 treaties in force applicable to 113 countries.<sup>60</sup> The obvious consequence is a lack of consistency and uniformity in the practice of extradition and potential jurisprudential confusion leading to increased litigation and prolongation of the process. Precedents would therefore usually affect the interpretation of the provisions of each treaty, thus stimulating increased judicial recourses and delays through the review process. In addition to the obvious advantages of uniformity, reduction of litigation, and shortening of delays in the process, a truly national legislation would also reduce the burden on the United States government in renegotiating with every foreign government basic substantive and procedural matters already contained in the national legislation. Furthermore, the existence of national legislation, while it would not preclude the government from negotiating treaty provisions that may be contrary to it, would nevertheless strengthen the government's position in its negotiations with foreign governments on provisions urged by the foreign government that would differ from national legis-

lation and thus maintain greater uniformity among treaties and conformity between treaties and the legislation. The more the legislation in its specific language allows for treaties to regulate certain substantive and procedural matters, the more likely it is that foreign governments will insist on particular clauses which may differ from the legislation. Furthermore, if national legislation is comprehensive, covering substance and procedure, this would allow extradition to be performed on the basis of "executive agreement" and "reciprocity,"<sup>61</sup> which the "Act" excludes, presumably in reliance on long-standing and established jurisprudence,<sup>62</sup> although nothing in the Constitution, in the opinion of this writer, would prevent it.<sup>63</sup>

Regrettably the general orientation of the "Act" is that it is a supplement to treaties or that it otherwise applies in the absence of contrary treaty provisions, but only when a treaty does exist between the requesting state and the U.S. Consequently all substantive and procedural matters which can of course be regulated by treaties will tend to be precisely that. This approach differs from that of many countries of the world who attempt to conform their treaties to national legislation and in fact specify in their treaties that they are applicable in accordance with national legislation.<sup>64</sup>

In addition, the "Act" is unclear as to reliance on multilateral international criminal law conventions as the basis for a relator's extradition.<sup>65</sup> These treaties provide inter alia that state parties are obligated to prosecute or extra-

dite individuals who have allegedly committed the proscribed conduct.<sup>66</sup> They contain no provision for the mechanism by which extradition is to be accomplished, because they remand to the applicable national. In the instance where the basis for the extradition request is such a multilateral international criminal law convention, the provisions of the "Act" are applicable. By structuring the "Act" as an adjunct to treaties rather than the generally applicable norm, the legislature neglected to take into account how this would affect reliance upon multilateral international criminal law conventions which contain extradition clauses. Thus, in this respect the "Act" is ambiguous. Since one of Congress' avowed primary objectives in its reform of existing extradition law and practice is to permit the U.S. to cooperate internationally in combatting international and transnational criminality,<sup>67</sup> the "Act's" failure to specifically provide for reliance upon multilateral international criminal law conventions containing an extradition clause is particularly unfortunate. Yet because of the ambiguity of the relevant language of the "Act," the courts could construe it as applicable in such cases, as is discussed below.

#### 6. Treaty Requirement for Extradition

Section 3191 of both the Senate version and the House version essentially provide that the United States may lawfully extradite an individual only pursuant to a formal request made by another state in reliance upon a treaty concerning extradition between the U.S. and the requesting

state.<sup>68</sup> This has been the consistent practice of the U.S.<sup>69</sup> with only a few exceptions early on in its practice.<sup>70</sup> To this extent, therefore, the "Act" is in conformity with existing law and practice. Regrettably the "Act" does not contemplate "reciprocity" as a basis for extradition without a treaty. This could have been accomplished with an "executive agreement" as a valid legal basis for extradition in the absence of a treaty and on the basis of the national legislation.<sup>71</sup>

The "Act" appears however to alter current practice, by permitting reliance on multilateral treaties as well as bilateral extradition treaties as a legal basis for extradition. The term "treaty" in the Senate bill is defined as "a treaty, convention, or international agreement, bilateral or multilateral, that is in force after advice and consent of the Senate."<sup>72</sup> The House bill defines "treaty" as "a treaty, convention or other international agreement that is in force after advice and consent of the Senate."<sup>73</sup> It must be noted that the original Senate version of the 1981 Extradition Act, S. 1639, did not intend reliance on multilateral international criminal law conventions containing an extradition clause, but the version reported out by the Judiciary Committee did.<sup>74</sup> This inclusion was carried forward in the subsequent versions of the bill in the Senate<sup>75</sup> and in the House bills.<sup>76</sup> Both the Senate and House Judiciary Committees specifically noted<sup>77</sup> that these definitions include both bilateral and multilateral treaties, as well as treaties which do not deal specifically

with extradition but contain an extradition clause such as conventions on international criminal law,<sup>78</sup> whether they are in force at the time this legislation has entered into effect or enter into force subsequent thereto. This interpretation would be warranted in recognition of the fact that international criminal law is in a developing state<sup>79</sup> and that new conventions can be anticipated. If this provision did not exist there would be a need for future revision of the "Act."

This provision offers the United States the opportunity to comply with those provisions in multilateral treaties to which it is a signatory which allow reliance on the applicable extradition provisions in these treaties instead of or in addition to bilateral treaties.<sup>80</sup>

Curiously, although multilateral treaties ratified by the Senate are as binding on the U.S. as bilateral treaties, the Department of State has never relied on multilateral treaties for extradition, clinging to bilateral treaties as the only basis for extradition. There is of course no merit to this position,<sup>81</sup> but it is the existing practice, and this provision of the "Act" raises the question as to whether it should be abandoned altogether, or merely relied upon only when a bilateral treaty exists with a requesting state which is also a signatory to the multilateral convention in question. These multilateral conventions however do not contemplate that they will be supplementary to bilateral extradition treaties; they are intended to permit reliance upon their extradition provisions in the absence of a bilateral treaty.



Although the provision of the "Act" defining "treaty" can be read to permit reliance upon multilateral international criminal law conventions as a legal basis for extradition, it could also be given a contrary interpretation, namely that reliance on multilateral conventions would be only in the case where in addition thereto there is a bilateral extradition treaty between the requesting state and the U.S. Thus the multilateral convention containing an extradition clause would only supplement the list of extraditable offenses under the bilateral treaty and no more. The lack of clarity as to the legislature's intent is as regrettable as is the absence of a clear intent to rely on such multilateral conventions without the need for a further bilateral treaty, and the applicability in such an event on the "Act" to extradition proceedings initiated on this basis.

Section 3191 of the "Act" states that the requirements of the applicable treaty must be found to have been satisfied.<sup>82</sup> This emphasizes that the treaty provisions whether substantive or procedural prevail over the provisions of the "Act."

Unlike the House bill, the Senate version does not explicitly require that a court order finding the relator extraditable be issued in order for extradition to be appropriate. Instead, it provides that there be "a treaty concerning extradition between the United States and a foreign state" and that "the foreign state request extradition within the terms of the applicable treaty."<sup>83</sup> The Senate Judiciary Committee Report noted, however, that previous federal law implicitly requires

a court order before extradition could be performed.<sup>84</sup> Presumably the Senate version carries forward this implicit requirement as well.

#### 7. Form of the Request in General

Both the Senate and House bills contain a similar section which provides that a "request" from a foreign government [hereinafter referred to as requesting state] must be made in form and in substance according to the requirements of each treaty.<sup>85</sup> This provision subordinates the legislation with respect to the form and substance of a "request" to the requirements of each and every treaty. Thus the substantive and formal requirements of each "request" will depend on the relevant provisions of the applicable treaty; only where the applicable treaty is silent will the "Act" apply. This situation will of course create as much diversity in form and substance of requests as there are treaties. Clearly a better approach would have been to have the "Act" control with respect to substance and form, or at least with respect to form, particularly the type of documentation required and certification thereof. Such an approach would have insured uniformity in the practice and would have made the task easier for those entrusted with the administration of extradition proceedings. It can be argued however that because of the diversity of the legal systems of states with which the U.S. has extradition relations it is difficult for the U.S. to impose by legislation a uniform set of requirements that will satisfy all the states with which it has or may entertain such relations.

Also because such requirements though formal have substantive legal significance they are not therefore readily acceptable by all states with which the U.S. seeks to have extradition relations. The Act preserves in this respect existing legislation and practice.<sup>86</sup>

#### 8. Renewed Requests

This question is dealt with in the House versions<sup>87</sup> but not in the Senate versions.<sup>88</sup> It is not present in existing legislation but has been the subject of litigation when the applicable extradition treaty contains what is now commonly termed a "double jeopardy" clause.<sup>89</sup> Such a provision is "common to most extradition treaties"<sup>90</sup> and usually states that extradition shall not be granted

[w]hen the person whose surrender is sought is being proceeded against or has been tried and discharged or punished in the territory of the requested Party for the offense for which his extradition is requested.<sup>91</sup>

The new House provision is thus in the nature of a statutory "double jeopardy" clause embodying the traditional doctrine of res judicata. It provides that if the Attorney General has previously sought an order for the extradition of an individual for a given offense based on a request by a given state and that request was denied (by the court) he cannot make a new request for the same individual based on the same offense at the request of the same state except upon a showing of "good cause." Presumably this means that the same or substantially same issues,<sup>92</sup> save in the case of discovery of new

evidence unknown at the time of the first request, cannot be relitigated unless the Attorney General shows "good cause" to the satisfaction of the court. Thus, a new request based on new factual allegations can be presented.

It is unclear from the legislative history as to whether this provision is to be construed in the nature of a statutory "double jeopardy" clause to be governed by federal criminal precedents on point arising out of national criminal jurisprudence or whether it partakes of the civil doctrine of res judicata because of the sui generis nature of extradition. The legislative history as expressed in the House Judiciary Committee report is that a new request cannot be based solely on the fact that the requesting state has failed to produce evidence of probable cause sufficient to satisfy the court when such evidence was available to it at the time of the hearing resulting in the court's refusal to grant the request.<sup>93</sup>

It is assumed by this writer therefore that the new request should be based on: (1) newly discovered evidence not available at the time of the first hearing, and (2) a showing of due diligence and good faith on the part of the requesting state and on the part of the U.S. government presenting the case on behalf of the requesting state, all of which are implicit in a showing of "good cause." Thus the negligence, lack of due diligence, lack of good faith, prosecutorial strategy of withholding evidence, and the political nature of the case or the relator would not be considered within the

meaning of "good cause," and the Government would be barred from presenting a renewed request under these circumstances.

#### 9. Priority in Requests

Unlike existing legislation, this question which is dealt with in the House version<sup>94</sup> but not in the Senate one<sup>95</sup> sets forth a hierarchy in the priority of requests whenever more than one state presents a request for the same individual and for the same or different offenses. In this instance it is the Secretary of State and not the Attorney General who has the unreviewable discretion, presumably because of the foreign relations implications of the decision, to determine which request to honor. In so doing, the House bill requires that he take into consideration the following relevant factors:

- (A) those set forth in an applicable treaty concerning extradition;
- (B) the nationality of the individual;
- (C) the state in which the offense is alleged to have occurred; and
- (D) if different offenses are involved, which offense is punishable by the most severe penalty, and if the penalties are substantially equal the order in which the requests were received.<sup>96</sup>

This necessary provision however subordinates the ranking of jurisdictional priorities to the applicable treaty.<sup>97</sup> Curiously however it favors the active personality theory<sup>98</sup> over the territorial principle,<sup>99</sup> ignores the passive personality theory<sup>100</sup> entirely and introduces a new jurisdictional notion based solely on the severity of the penalty. This last notion is new in U.S. law and practice<sup>101</sup> but is found in the European Convention on Extradition.<sup>102</sup>



# 10. Initiation of the Proceedings

This section is similar in both the Senate and House versions. It provides that extradition proceedings are to be initiated by the Attorney General as the complainant.<sup>103</sup> Thus, no action can be commenced by any other party purporting to represent the requesting state. This changes existing practice which authorizes the action to be brought not only by the Attorney General but also by a representative of the requesting state, including private counsel.<sup>104</sup> This aspect of current U.S. practice is anachronistic; most major legal systems of the world require that the requesting state be represented by the government of the requested state.<sup>105</sup> Present U.S. practice is incompatible with the policy considerations upon which extradition is based, since extradition involves the foreign relations of the U.S. and its treaty obligations, and the proceedings are criminal in nature rather than civil. The "Act" remedies these aspects of current practice.<sup>106</sup>

The "Act" also states that these actions must be commenced in the federal district court wherein the individual is believed to be found.<sup>107</sup> Thus under the "Act," unlike existing legislation, no proceedings may be commenced before state judges.<sup>108</sup> Current legislation represents another historical anachronism, since the federal system of the U.S. and the foreign relations nature of extradition make it so obvious that the matter should be exclusively within federal jurisdiction though it has been so in practice.

The "Act" also provides that the Attorney General may commence an action and seek a warrant in the federal district court for the District of Columbia if the whereabouts of the person sought are not known to him at that time.<sup>109</sup> This change adds a helpful new dimension to existing legislation which permits warrants to be issued only in the district where the relator is believed to be found. Thus until his whereabouts are discovered no warrant can be issued.

Under the "Act," if the person sought has been arrested on the basis of a warrant issued by the Federal District Court for the District of Columbia, the matter will then be transferred to the district court wherein the arrest has been performed. Provision for transfer of the proceedings from the district court of the District of Columbia to the district court where the relator is found is specifically included in the House version but not in the Senate bill. The House bill states that "[w]hen the person is found, the matter shall be transferred to the United States district court to which the person arrested is taken under subsection (d) of this section."<sup>110</sup> Subsection (d) specifies that the relator upon arrest "shall be taken . . . before the nearest available United States district court. . . ."<sup>111</sup> The Senate version contains no provision for transfer of the proceedings, although it does state that upon arrest the relator "should be taken . . . before the nearest available court. . . ."<sup>112</sup> The Senate Judiciary Committee's Report, similarly, makes no reference to transfer of the proceedings.<sup>113</sup> It would appear that

nothing would preclude such transfer to the district court which is geographically closest to the place of arrest as opposed to the one which would have jurisdiction by virtue of the geographical limits established in the judicial organization of the federal district courts.<sup>114</sup>

The purpose for this provision is to have the arrested person brought before a magistrate or a judge without unnecessary delay<sup>115</sup> although it may appear to provide an opportunity to the government for limited forum shopping.<sup>116</sup>

The "Act" does not provide for the docket-setting of the action which to date is part of the civil docket. Presumably this practice would continue unless changed by Supreme Court Rule as provided for in Section 3199(f) of the House bill.<sup>117</sup>

#### 11. The Complaint

A complaint is the basis for commencing extradition proceedings and is the basis upon which the arrest warrant may be issued. All subsequent proceedings are based on the complaint, such as the hearing and the order of the court. A complaint may therefore be amended or dismissed by order of the court, stipulation of the parties, or by the government based on prosecutorial discretion.

Under the "Act," the complaint must be made by the Attorney General under oath or affirmation, similar to verified complaints in civil matters<sup>118</sup> and to informations in criminal matters,<sup>119</sup> though the "Act" does not specify which of the two practices is the analogous one. This section provides that the form of the request is subject to the requirements of the

applicable treaty; nonetheless, the same provision also requires the Attorney General to verify the complaint, irrespective of treaty provisions. This requirement which appears essentially to be an internal legal procedure is nonetheless controlling even if a treaty does not require verification of a complaint. This is the only provision in the "Act" which subordinates a treaty to the "Act." In the unlikely event of a conflict between a treaty provision and this provision of the "Act," under established constitutional jurisprudence the treaty will prevail if it is subsequent to the Act.<sup>120</sup>

A practical problem could arise with respect to the verification requirement in the event that a treaty does not require the requesting state to verify its request to the U.S. or to have its supporting documents presented under oath or affirmation, while this section requires the Attorney General to present a complaint on oath or affirmation which would certainly have to be based on the representations of the requesting state. This would place the Attorney General in a position of having to present a complaint under oath or affirmation based on a request by a foreign state and documents that such a state may present without being under oath or affirmation. The Secretary of State of course could refuse to accept the request unless verified, and return it through diplomatic channels to the requesting state for compliance. The requesting state could object if the applicable treaty did not contain a general clause which would require compliance

with national legislation in matters not specifically in the treaty in question.

Both the Senate and House bills contain a detailed subsection setting forth the required contents of the complaint and supporting documents.<sup>121</sup> A distinction exists between the requirements for a complaint to support an arrest warrant and for a complaint to support a provisional arrest warrant, though it is specifically stated in the legislative history of the bills but not specified in the "Act" itself.<sup>122</sup> Under both bills, the complaint to support an arrest must specify the offense for which extradition is sought and be accompanied by a copy of the request for extradition and by the evidence and documents required by the applicable treaty.<sup>123</sup>

A complaint which will support a provisional arrest warrant under the House version of the "Act" must contain the following:

- (i) information sufficient to identify the person sought;
- (ii) a statement --
  - (I) of the essential factual allegations of conduct constituting the offense that the person sought is believed to have committed; or
  - (II) that a judicial document authorizing the arrest or detention of such person on account of accusation or conviction of a crime is outstanding in the foreign state seeking extradition; and
- (iii) a description of the circumstances justifying such person's arrest.<sup>124</sup>

The Senate version of the "Act" is substantially similar to that of the House, in that it requires the information and documentation specified above.<sup>125</sup> The Senate's requirement is



different in that it provides an alternative to these requirements; thus, if the specified information and documentation are not provided, the complaint will nonetheless be deemed sufficient if it contains "such other information as is required by the applicable treaty. . . ." <sup>126</sup>

The hybrid legislative approach to extradition proceedings is once more manifested in this provision which describes the requirements of the complaint partly as if it were a criminal information, <sup>127</sup> and partly as a verified civil complaint. <sup>128</sup> The legislature's approach fails to take into account that courts must characterize the nature of the complaint in order to determine its sufficiency. Because of the mixed nature of the requirements stated in the "Act," courts will have to grapple with a lack of clarity as to which characterization is controlling. This could likely result in a lack of uniformity between the circuits regarding the sufficiency of complaints until the Supreme Court decides the question either by decision or under its rule-making authority if the House provision in Section 3199(f) is ultimately enacted.

The fact that this provision is a codification of existing jurisprudence <sup>129</sup> does not obviate the difficulties presented by its mixed nature, because the jurisprudence upon which courts rely in order to review the sufficiency of that which has evolved through prior practice is not identical to its new task of statutory interpretation in light of new legislation. Thus, previously valid precedent may become the

subject of new controversy, unless the new legislation is clear or made clear thereafter.

This provision also contains certain substantive requirements for extradition which are couched in terms of elements of the complaint the absence of which could presumably become grounds for dismissal of the complaint. It is also formulated in terms of procedural norms applicable to this stage of the proceedings. The mixture within this provision between substantive requirements, procedural norms, and formal rules of practice is unfortunate because it lumps together requirements of such divergent legal significance which should be formulated separately. This confusion is all too frequent in a number of other provisions of the "Act," as discussed contextually in this article.

This provision also raises a problem with respect to the sufficiency of the complaint and the consequences deriving from a lack of sufficiency. The substantive requirements stated in this section are the same requirements which are reiterated in subsequent sections of the "Act" as necessary for a finding of extraditability.<sup>130</sup> The question however arises as to whether these requirements are indispensable elements of the complaint the absence of which would be grounds for dismissal, and if so whether dismissal would be with or without prejudice.<sup>131</sup> In other words, it is unclear whether the complaint would be considered as governed by the Federal Rules of Civil Procedure on complaints<sup>133</sup> or the Federal Rules of Criminal Procedure on informations.<sup>133</sup> An

additional problem arises under the House version, which restricts the Attorney General ability to file new complaints, under Section 3192(a)(2).<sup>134</sup> It would appear that the House version would require dismissal with prejudice, in order for the court to give effect to the requirements of Section 3192(a)(2) precluding a new filing as discussed above in Section 8.

In grappling with these issues, courts will obviously have to determine the predominance of either the civil or the criminal aspects of this hybrid legislative approach. If the court's inquiry will vary from section to section, it is likely that this section regarding complaints will be characterized as partaking of civil procedure rather than criminal. If the court's inquiry is broadened to consider this section in the context of the overall nature of the "Act," however, it is more likely to conclude that the criminal nature of the process is predominant over its civil aspects. This contradictory result could have been avoided had the "Act" been more specific on this and similar issues.

Nothing in the "Act" or any of the various bills refers to prosecutorial discretion in presenting, amending, or withdrawing a complaint. It is assumed that such discretion as is now practiced in criminal cases will apply.<sup>135</sup>

12. Judicial Action upon Filing of Complaint: Summons, Arrest and Preliminary Hearing

The Senate and House versions of the "Act" contain

similar though not identical provisions regarding summons, arrest warrants, and the preliminary hearing.<sup>136</sup> The major difference between the versions is in their treatment of the bail aspects of this phase of the practice. Both provide that upon the filing of a complaint, the district court shall issue a warrant for the individual's arrest or, if the Attorney General so requests, a summons for the individual's appearance at the extradition hearing. The summons for appearance is a new feature that does not exist under the present legislation.<sup>137</sup> The "Act" does not however provide standards for distinguishing between those cases in which a summons can be issued and those in which an arrest warrant is more appropriate. The Attorney General apparently has complete discretion but the question of abuse of discretion is likely to be the subject of litigation.<sup>138</sup>

Under existing legislation a warrant for provisional arrest can be issued only if the applicable extradition treaty provides for it;<sup>139</sup> under the new "Act" such authority is also statutorily derived.<sup>140</sup> Consequently under the "Act," a person could be provisionally arrested even if the applicable treaty does not specifically permit it. Because many of the more recent extradition treaties provide for provisional arrest, however, this subsection is not a major reform of existing practice; nevertheless, it does provide both a legislative basis for the practice and limits thereto of 60 days with subsequent extensions of 15 days each upon a showing of

good cause.<sup>141</sup> The constitutionality of this provision in the absence of "probable cause" is very questionable.<sup>142</sup>

The Senate version provides that the procedures for issuing an arrest warrant are those set forth in Rule 4(d) of the Federal Rules of Criminal Procedure,<sup>143</sup> even though the federal rules of criminal procedure do not otherwise apply to extradition save for some specific exceptions discussed contextually below. Thus, the application of this rule is limited to the execution and return of arrest warrants and summons. The House version provides only that the Federal Rules of Criminal Procedure are applicable.<sup>144</sup>

Both the Senate and House bills state that upon arrest the relator must be brought without unnecessary delay to the nearest available federal district court.<sup>145</sup> Availability is based on geographic proximity rather than jurisdictional competence, since both bills permit the government to select a district court other than the one having jurisdictional competence.<sup>146</sup> This rule is analogous to Rule 5 of the Federal Rules of Criminal Procedure.<sup>147</sup> However, there is no indication as to whether or not a failure to bring the arrested person without unnecessary delay before the nearest federal district court judge or magistrate would result in any invalidity of a confession or inadmissibility of evidence obtained from the arrested person during this period.<sup>148</sup>

### 13. Arrest and Release on Bail

Arrest and release on bail are two of the most important



and difficult areas of extradition law and practice. While probable cause is required for an arrest by virtue of the Fourth Amendment,<sup>149</sup> release on bail is controversial because the Sixth Amendment has not been held applicable to extradition proceedings, though a qualified right to bail exists.<sup>150</sup>

The government's request for an arrest warrant must specify the offense for which extradition is sought, and be accompanied by a copy of the request for extradition and the evidence and documents required by the applicable treaty.<sup>151</sup> The "Act" on its face does not require "probable cause" in regard to the issuance of an arrest warrant before an extradition hearing. This does not affect however the constitutional requirement of probable cause under the Fourth Amendment. As a matter of statutory interpretation, it is well established that when a statute is ambiguous, "construction should go in the direction of constitutional policy."<sup>152</sup> Therefore, the "Act" should be interpreted as requiring a showing of probable cause in order for an arrest warrant to issue. The broad language of the Fourth Amendment, that "no Warrants shall issue, but upon probable cause,"<sup>153</sup> include warrants for arrest for purposes of extradition. Though extradition is a form of international judicial assistance, it is still subject to U.S. constitutional provisions.<sup>154</sup> For a given aspect of legal proceedings, no matter of what nature, to touch upon the foreign relations of the U.S. is not a sufficient basis to displace basic constitutional guarantees.

Because of the Fourth Amendment the Government acting on behalf of a state requesting extradition, would have to present to the magistrate issuing an arrest warrant allegations of "facts and circumstances 'sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense,'" <sup>155</sup> before a warrant could be issued. Since the "simple suspicion of police suspicion is not itself a sufficient basis for a magistrate's finding of probable cause," <sup>156</sup> the issuance of arrest warrants for extradition hearings must follow these constitutional standards. Furthermore, the applicability of constitutional standards to extradition arrest procedures would include the well-known "four-corners rule," that in passing upon the validity of a warrant, a reviewing court may consider only information brought to the magistrate's attention. <sup>157</sup> Therefore, additional information possessed by the U.S. Government which is not communicated to the magistrate in its request for an arrest warrant may be excluded from subsequent consideration on constitutional grounds. <sup>158</sup> Should the courts construe the "Act" to not require a showing of probable cause before an arrest warrant is issued, then this portion of the "Act" would be held unconstitutional. With respect to non-U.S. citizens, the absence of a probable cause requirement cannot be justified on the basis of the diminished protections afforded aliens, since they may raise fourth amendment claims. <sup>159</sup> Furthermore, since both citizens and aliens are extraditable under the "Act," <sup>160</sup> the equal protection clause of the Fifth Amendment applies.

The paradox in this area is that should it be held that the Fourth Amendment requires that probable cause exists before a person is arrested and brought into custody for an extradition hearing, then the warrant procedures set out in the "Act" are no longer required at all times, since it is well established that a warrantless arrest is not invalid as long as the officers had probable cause at the time of arrest.<sup>161</sup>

Furthermore, the necessity of an initial, before-arrest showing of probable cause is particularly acute in the extradition area, because of the peculiarities of release on bail available to relators.<sup>162</sup>

The "Act" does not distinguish between provisional arrest and other arrests insofar as the required standards of probable cause for arrest though the Fourth Amendment requires it in both cases. Presumably the same standards will apply though clearly provisional arrests which are ostensibly based on grounds of emergency may not allow the government to produce the type of probable cause that would otherwise be required for an arrest.<sup>163</sup> In other words some type of probable cause is still required for a provisional arrest irrespective of the applicable treaty,<sup>164</sup> but no standards therefor are established in the "Act." Clearly the purpose of provisional arrest is to avoid flight before the filing of a complaint and the issuance of an arrest warrant. If the Attorney General intends or files a motion for issuance of summons the emer-

gency basis justifying a provisional arrest could be challengeable.

With respect to standards of probable cause for provisional arrests and arrest warrants the "Act" does not specifically change existing jurisprudence which requires for arrest warrants the same type of probable cause required for any other arrests in criminal cases which are included in the protection of the Fourth Amendment.<sup>165</sup> The same applies to provisional arrests, although the tests applied are different because of the emergency and temporary nature of the arrest.<sup>166</sup> However it must be noted that in the absence of a fair bail provision, a 60 day period of provisional arrest provided for in the "Act"<sup>167</sup> without adequate probable cause is unconscionable.<sup>168</sup>

Release of persons who are subject to a provisional arrest or arrest warrant has been the subject of controversy in existing jurisprudence which does not recognize a constitutional right to bail but provides for bail whenever the relator can show "special circumstances."<sup>169</sup> The House version provides for an elaborate scheme for bail which rejects the verbatim incorporation of the Bail Reform Act<sup>170</sup> but nevertheless sets forth substantially similar criteria against the unexplainably strong opposition of the Administration. In addition, the House version allocates different burdens of proof on the relator and on the government depending upon a certain time schedule particularly with respect to provisional arrests.<sup>171</sup> Under the House bill, a relator has the burden of

showing eligibility for release on bail after his provisional arrest; the burden is on the relator for ten days to show his eligibility by a "preponderance of evidence." Thereafter, the burden shifts to the government to show that the relator should not be free pending the extradition hearing.<sup>172</sup> The relator can satisfy his burden of proof during the ten-day period by showing, by a preponderance of the evidence, that his release will not present a "substantial risk of flight," that if released he will not be a danger to another person or to the community, and that his release will not jeopardize a United States treaty obligation.<sup>173</sup> At the end of the initial ten-day period following arrest, the House bill overturns the existing jurisprudence, places the burden of proof on the government, and specifies the factors a magistrate is to consider in determining eligibility for, and the conditions of, release pending the extradition hearing.<sup>174</sup> Having done away with the presumption against release prior to the hearing, the House bill, consistent with existing legislation, reinstates the rule concerning a relator's appeal of a determination of eligibility to bail. Thus bail is available to a relator-appellant only if he makes the evidentiary showing required during the initial ten-day period, and additionally shows that he has a "great" chance of success on appeal.<sup>175</sup>

Under existing jurisprudence, there is a strong constitutional policy, based upon the Eighth Amendment's prohibition on "excessive bail,"<sup>176</sup> in favor of a person's release until his case is finally determined.<sup>177</sup> The explicit recognition



of the right to bail pending the extradition hearing is, as far as it goes, consistent with this constitutional policy and the Bail Reform Act though the latter is not incorporated per se in the House bill provisions on bail. Nevertheless, the degree of similarity between the House bill provisions regarding bail after the initial ten-day period and the Bail Reform Act provisions is so substantial that it supports the conclusion that the jurisprudence of the Bail Reform Act may be held applicable to these similar provisions of the House bill.<sup>178</sup>

The legislative history of the House bill indicates that the placement of the burden of proof on the relator during the ten days after his arrest was thought to be justified because the United States is frequently asked by foreign states to arrest certain persons provisionally and hold them until the necessary background information is provided. Under these circumstances, without any background information, the United States would be unable, immediately after the arrest, to show the inappropriateness of release on bail.<sup>179</sup>

The House version also grants release on bail pending appeal and places the burden of showing eligibility on the relator.<sup>180</sup> Unfortunately, among these is a provision refusing a showing that such release would not jeopardize extradition extradition relations with another state.<sup>181</sup>

This provision introduces an unconscionable political dimension in the processes of criminal justice which courts are ill equipped to assess. If a relator were to challenge the constitutionality of the bail provisions under the House bill, then the federal courts would

have to weigh the importance of these governmental interests.<sup>182</sup>

The Senate version continues existing practice of allowing bail only for "special circumstances" which the relator must prove.<sup>183</sup> Though it does not specifically provide for bail during the 60 days of potential provisional arrest, presumably the "special circumstances" standards apply.<sup>184</sup> The same standards apply to bail pending appeal.<sup>185</sup>

Neither the Senate nor the House versions refer to discovery by the relator, and it is presumed that the existing limited practice of discovery will continue to apply.<sup>186</sup>

#### 14. Waiver of Hearing

The Senate and House bills contain similar sections regarding waiver, under Section 3193. It is a novel procedure whereby a relator may waive a hearing on extradition and any and all requirements under the treaty or the legislation. This requirement is imposed in order to avoid allowing the relator to waive some of the charges and not others and therefore benefit selectively from the rule of specialty,<sup>187</sup> which would obligate the requesting state to prosecute him only for the crime or crimes for which the order predicated on the waiver was actually issued which thus precludes prosecution or punishment for any other crime, even one that was part of the extradition request but which was not the object of the waiver.

The Senate version states that the waiver is irrevocable.<sup>188</sup> The House version, however, allows for revocation

when there is an "extraordinary change of circumstances."<sup>189</sup> Presumably this would include instances such as a change in government in the requesting state or the discovery of evidence indicating that the relator would not receive a fair trial in the requesting state. The court can make such a determination in the best interests of justice which allows it enough latitude to use the analogy with withdrawal of guilty pleas in federal criminal cases.<sup>190</sup>

Both versions state that the waiver must be with full knowledge of its legal consequences and with advise of counsel whether retained by the relator or appointed in case of indigency.<sup>191</sup> Although the Section requires the court to inform the relator of his rights under the legislation and the implications of his waiver,<sup>192</sup> it does not state what sanction will apply in the event the court fails to do so. Presumably failure to do so would be grounds for revocation of the waiver and vacation of an order based thereon, but that is left to future jurisprudential determination.<sup>193</sup>

The "Act" implicitly requires that a relator consent to a waiver after he has informed the court of his willingness to consent and has been advised by the court of the charges against him for which his extradition was requested, however, such specific language should have been included, in order to ensure that a relator's consent is made with full knowledge of the charges against him and to ensure that the court record reflects the charges for which the individual was extradited.<sup>194</sup> This latter guarantee would have preserved the rule

of specialty,<sup>195</sup> and could have been accomplished through the insertion of explicit language in the "Act" that waiver of the extradition hearing is linked to the rule such that the relator upon return can be prosecuted in the requesting state only for the offense for which the extradition hearing was waived. It is important to bear in mind that the rule benefits not only the relator but also the U.S. government to ensure that its processes have not been used for a purpose other than the one specified in the treaty. Theoretically the U.S. government can waive the rule without the need for a judicial hearing provided the requesting state has "probable cause" for other offenses and is not seeking to prosecute the relator for political, racial, religious, or ethnic reasons.<sup>196</sup> The "Act" does not alter existing jurisprudence and governmental practice on this subject.<sup>197</sup>

The Senate and House versions fail to provide for bail when the relator has waived his right to the extradition hearing. The Senate bill provides no guidelines for a relator's release pending surrender.<sup>198</sup> The House version provides standards for bail only in Section 3199, the final section in the bill.<sup>199</sup> There is no specific provision for bail when the relator has waived the extradition proceeding.<sup>200</sup>

The Senate version provides specific time limitations on detention in its section regarding waiver.<sup>201</sup> It requires that the relator be removed within 30 days from the date of waiver; if not removed within this period, the relator may petition for release. The burden is placed upon the Attorney

General to show "good cause" why the relator should not be released. The standard of "good cause" is not defined anywhere in the bill, however.<sup>202</sup> The House bill requires that the relator be removed within 30 days from the court's certification of the transcript.<sup>203</sup> If not removed within this time limitation, the relator may petition the court for dismissal of the complaint against him and dissolution of the court's order of extraditability.<sup>204</sup> As in the Senate bill, the House version permits the Attorney General to show "good cause" why the relator's petition should not be granted; the standard of "good cause" is not defined.<sup>205</sup>

Both versions of the "Act" require that the Attorney General consent to the relator's waiver of the extradition hearing.<sup>206</sup> The Senate Judiciary Committee noted that this requirement was included to preclude the relator from leaving the United States in order to avoid prosecution or punishment in this country, and to give the requesting state the latitude to prosecute and punish the relator for all of the offenses specified in the complaint, thus preserving the rule of specialty,<sup>207</sup> as noted in Report of the House Judiciary Committee.<sup>208</sup> The Report also states, however, that the "Secretary of State does not have the discretionary authority to refuse to surrender a person who has waived the proceeding under this chapter."<sup>209</sup> Thus, the relator's waiver of the extradition hearing is understood to be a bar to the Secretary of State's executive discretion to deny extradition. This is in error, since that discretion is inherent in the Constitution's sepa-



ration of powers and not derivative from the legislature. Nothing in the "Act," nor any drafts, refers to partial waiver by the relator. In practice this might well be the case, and presumably the government in consultation with the requesting state could stipulate to it with the relator.

Much like the "guilty plea" in criminal proceedings, the waiver procedure will provide an opportunity for negotiations prior to the formal entry of a waiver.<sup>210</sup> If a person sought for extradition waives a hearing and an appeal by right,<sup>211</sup> it is common sense to expect that such a person will seek to obtain some quid pro quo; this is the opportunity for it, as it has been in criminal proceedings. However in extradition it is difficult to see how the Government can compromise the rights of the requesting state. It can of course amend the complaint and delete certain charges or reduce them, but this implies consent of the requesting state and that of the Secretary of State. It can be argued that once a request is made by a requesting state all procedural aspects thereafter, and waiver is one, are subject to national law, and if such law gives the Attorney General explicit or implicit discretion it cannot be subjected, save in cases of specific treaty requirement, to the approval of the requesting state. Nevertheless it is the contention of this writer that the prior consent of the Secretary of State should be obtained for two reasons:

- (1) it is a matter affecting foreign affairs which the Secretary of State is to account for to the requesting state, and
- (2) the Secretary of State will have to enforce under the rule

of specialty a court order which is based on something other than the requesting state submitted its request for and should be in a position to do so effectively by sharing in the original decision.

The waiver procedure is however intended to accelerate the processes of extradition<sup>212</sup> and will very likely accomplish this, although it will also result in increased negotiations and plea bargains.

#### 15. Extradition Hearing and Order

Section 3194 of both the Senate and House bills provide for procedural and substantive aspects regarding the extradition hearing, evidence which can be presented by the Attorney General and the relator, defenses which the relator may raise as a bar to extradition, the findings of the court, and the certification of the court's findings. It contains a mixture of substantive and procedural requirements and formalities.

##### A. The Hearing

Both the Senate and House bills structure the extradition hearing such that it is sui generis, partaking of both criminal and civil characteristics. Although the Federal Rules of Criminal Procedure and the Federal Rules of Evidence are not applicable per se in an extradition hearing,<sup>213</sup> all versions of the bill make specific reference to the applicability of these Rules<sup>214</sup> and implicitly incorporate the Rules on numerous occasions.<sup>215</sup> The characterization of extradition as a sui generis matter was developed by the courts' jurisprudence

primarily to fill legislative gaps caused by piecemeal amendments to U.S. extradition laws between 1848 and 1968.<sup>216</sup> Although the "Act" is portrayed by its supporters as a "complete reform and revision" of U.S. law and practice,<sup>217</sup> it is in many respects a codification of current jurisprudence and practice in the extradition hearing<sup>218</sup> but leaves many gaps as indicated in this article. It is unfortunate that the "Act" continues the sui generis characterization of the extradition process developed by jurisprudence instead of giving it a more distinguishable procedural nature. In so doing, the "Act" missed an opportunity to dispel the ambiguity inherent in existing practice which is likely to pose problems in the court's interpretation of this Section.

Both versions of the "Act" require that the court shall hold the extradition hearing as soon as practicable after the service of summons or arrest of the person requested.<sup>219</sup> The Senate bill states that the court is "to determine whether the person against whom a complaint is filed is extraditable as provided in subsection (d),"<sup>220</sup> while the House bill provides that the court is "to determine issues of law and fact with respect" to the complaint.<sup>221</sup> The Senate bill further specifically states that "[t]he purpose of the hearing is limited."<sup>222</sup> No such equivalent statement is included in the House bill. In addition, the Senate bill notes that

[t]he court does not have jurisdiction to determine--

(1) the merits of the charge  
against the person by the foreign  
state;

(2) whether the foreign state is seeking the extradition of the person for the purpose of prosecuting or punishing the person for his political opinions, race, religion, or nationality; or

(3) whether the extradition of the person to the foreign state seeking his return would be incompatible with humanitarian considerations.<sup>223</sup>

The House bill, however, simply states that "the guilt or innocence of the person sought to be extradited . . . is not an issue before the court."<sup>224</sup>

The two versions of the "Act" also specify the rights of the relator at the extradition hearing. Both are virtually identical in their provision of the relator's right to representation by counsel, and the relator's right to court-appointed counsel if he is financially unable to obtain one.<sup>225</sup> However, the Senate bill makes specific reference to Title 18 U.S.C. Section 3006A<sup>226</sup> with regard to the relator's right to court-appointed counsel, while the House bill makes no reference to any source of this right.<sup>227</sup> In addition, the Senate version does not specifically provide that the relator's right to representation by counsel arises at the extradition hearing;<sup>228</sup> the House version, on the other hand, provides that the right arises at the hearing.<sup>229</sup>

Both versions of the "Act" also provide for the relator's right to cross-examine witnesses. They differ, however, as to the scope of this right. The Senate bill provides only that the relator "may cross-examine witnesses who appear against him."<sup>230</sup> The House bill goes beyond this, by stating that the

relator has the right "to confront and cross-examine witnesses."<sup>231</sup> It contains no qualifying statement to the effect that this right is limited to a cross-examination of only those witnesses who appear against him.<sup>232</sup> None of the versions refers to compulsory attendance of witnesses favorable to the relator.

Finally, both bills give the relator the right to introduce certain evidence although none refers to discovery. The Senate bill provides that the relator "may introduce evidence in his own behalf with respect to the matters in subsection (d)."<sup>233</sup> Subsection (d) is a statement of the findings the court must make in ordering the relator's extradition.<sup>234</sup> They are substantially similar to those required under the House version.<sup>235</sup> The House bill provides that the relator "may introduce evidence with respect to the issues before the court."<sup>236</sup> Both versions require that the court inform the relator of his rights and of the purpose of the hearing.<sup>237</sup> The Senate bill states this latter aspect as a "limited purpose."<sup>238</sup>

There are numerous parts of this section which will present novel, and potentially difficult, issues of interpretation and implementation. First, the requirement in both versions of the "Act" that the hearing be held promptly is analogous to Rule 5 of the Federal Rules of Criminal Procedure.<sup>239</sup> However, no sanctions are established under the legislation to provide for when a hearing is not held promptly.<sup>240</sup> Presumably this embodies a form of statutory



speedy trial right which though guaranteed under the Sixth Amendment has not heretofore been held applicable to extradition proceedings.<sup>241</sup> The same situation prevails under Section 3195 with respect to expedited appeals;<sup>242</sup> there again, there are no sanctions for unreasonable delays. The judiciary may therefore find that the federal standards and sanctions for speedy trial are applicable<sup>243</sup> and rely on the spirit of the legislation to accomplish this. The "Act" does not refer in any way to pre-trial discovery and it is assumed that existing jurisprudence would apply.<sup>244</sup>

In addition, the House version's provision for the relator's right to confront and cross-examine witnesses is unclear, since the bill does not state whether or not the court can compel the appearance of witnesses who are not in the United States.<sup>245</sup> This provision is analogous to 18 U.S.C. § 4214 applicable to federal criminal proceedings,<sup>246</sup> even though as stated above the legislative history of the "Act" specifies that such rules do not per se apply to extradition proceedings,<sup>247</sup> nevertheless such analogies are permissible if one seeks guidance from the legislative intent. Moreover the bill does not provide for the right of the relator to compel the appearance of any affiant or person who prepared any of the affidavits presented by the government on behalf of the requesting state.<sup>248</sup> Thus while certain procedural rights of the defense are specified which are analogous to those existing by statute and case law to federal and state criminal proceedings none of the remedies or sanctions for

their violation are specified in the "Act." This problem is recurring throughout the "Act" which does not refer to these counterpart constitutional rights and standards applied in federal and state criminal proceedings; nevertheless the "Act" creates sufficient inferences for courts to reach the conclusion that some analogy exists between procedural norms under the "Act" and their counterpart in federal criminal proceedings. The result for a while might well be increased litigation of these questions.

#### B. Evidence and the Authentication of Documents

Both versions of the "Act" provide for the admissibility of properly authenticated documents. Essentially, the "Act" requires that such documents are admissible if they have been properly authenticated under either the terms of the applicable treaty, the laws of the United States, or the laws of the state requesting extradition.<sup>249</sup> The House version differs from that of the Senate by specifying that authentication, if being established under the laws of the United States, must be performed in accordance with "the Federal Rules of Evidence for proceedings to which such rules apply."<sup>250</sup> The Senate bill requires only that authentication in this instance be performed in accordance with the "applicable . . . law of the United States."<sup>251</sup> In addition, the Senate bill states that documents not authenticated according to the requirements of one of the three methods listed above are nonetheless admissible if there is a showing of "other evidence . . . suffi-

cient to enable the court to conclude that the document is authentic."<sup>252</sup>

Both versions of the "Act" also provide that the existence of a treaty may be established through an "affidavit by an appropriate official of the Department of State."<sup>253</sup> The Senate version also allows for a certificate from such an official, rather than an affidavit, in order to establish the existence of a treaty between the United States and the requesting state.<sup>254</sup> In addition, the bill states that such certificate or affidavit is admissible to establish not only the existence of a treaty, but also to establish the treaty's interpretation.<sup>255</sup> The House bill simply states that such affidavit is admissible to prove "the existence of a treaty relationship between the United States and a foreign state."<sup>256</sup>

Both versions of the "Act" state that the court may consider hearsay evidence as well as properly authenticated documents in making its decision.<sup>257</sup> In addition, both the Senate and the House versions state that if the applicable treaty

requires that such evidence be presented on behalf of the foreign state as would justify ordering a trial of the person if the offense were committed in the United States, the requirement is satisfied by evidence establishing probable cause to believe that the offense was committed and that the person sought committed the offense.<sup>258</sup>

A better, simpler, and more expeditious formula would have been to allow authentication in accordance with the Hague Convention.<sup>259</sup>

C. Substantive Requirements: Double Criminality and Probable Cause

The "Act" essentially provides that the court determine issues regarding the requirement of double criminality and probable cause. The Senate and House bills vary in their treatment of these two requirements, one of which (double criminality) is of a truly substantive nature, while the other (probable cause) is to this writer more of a procedural constitutional requirement.

I. The Requirement of Double Criminality

Traditionally the most important substantive requirement for extradition is that the crime for which the relator is sought is an offense listed in the extradition treaty and that such an offense constitutes a crime under the laws of the state wherein the individual was found or under federal criminal law.<sup>260</sup> This is known as the rule of double criminality.<sup>261</sup>

Both the Senate and House version of the "Act" broaden this requirement by establishing that the offense must be punishable under the laws of (1) the United States; (2) the majority of the states; or (3) the state where the relator was found.<sup>262</sup>

This provision states that if the offense is punishable under the laws of "the majority of the states," it will be deemed to have satisfied the rule of double criminality. Assuming the government is proceeding on this basis, it is obvious that such a provision causes a problem in determining

what constitutes a crime under the majority of the states-- whether this is a numerical standard or simply a general conceptual one.<sup>263</sup> This also poses a problem with respect to establishing "probable cause." What state law will be relied upon to first determine the elements of the crime, and second to apply these elements to the facts of the case to determine probable cause? In addition, it is unclear what standards will be relied on. This may pose a challenge for the courts to arrive at a workable solution which is not likely to find uniformity in the different circuits before the Supreme Court determines the question, though with the large number of states that have adopted in one form or another the ALI Model Penal Code<sup>264</sup> there may be more uniformity in U.S. criminal laws than it would appear in light of historical differences in state criminal laws.<sup>265</sup>

The House version, unlike the Senate's, at this writer's suggestion<sup>266</sup> introduced a new dimension to the rule of double criminality by requiring that the offense in question be punishable by at least one year's imprisonment in the event the person is sought for trial; or, in the event the person is sought for imprisonment, that the sentence that remains to be served with respect to such offense exceeds 180 days.<sup>267</sup> This will avoid using the lengthy and costly extradition proceedings for minor criminal matters.

The "Act" wisely dispenses with the unnecessary historical practice in U.S. extradition treaties of specifically listing extraditable offenses. This only meant that a deter-



mination of the extraditability for the offense charged had to conform to the crime as listed in the treaty. This was the object of delaying litigation when the terms used in the list did not conform exactly to the offense charged or became obsolete (i.e., does larceny mean theft, does theft include embezzlement, etc.).<sup>268</sup> It also gave rise to the need to renegotiate treaties for inclusion of new forms of criminality (i.e., computer crime today, hijacking some few years ago) with all that this comports of the lengthy Senate ratification process.

## II. The Requirement of Probable Cause and Evidentiary Standards

### 1. Probable Cause

Both the Senate and House bills state that the Attorney General must show the existence of "probable cause to believe that the person before the court is the person sought, in order for the Court to grant extradition."<sup>269</sup> The two bills differ, however, as to the requirement that there be probable cause to believe that the relator committed the offense for which he is sought.

The Senate bill makes no explicit statement regarding probable cause that the relator committed the offense(s) specified in the complaint. Instead, it merely states that the evidence presented must be "sufficient to support the complaint under the provisions of the applicable treaty."<sup>270</sup>

The House version states that the Attorney General must show either that there is

probable cause to believe that the person before the court committed the offense for which such person is sought; or

The evidence presented is sufficient to support extradition under the provisions of the applicable treaty concerning extradition. . . .271

Current U.S. extradition practice requires a showing of probable cause that the relator committed the offense for which his extradition is requested.<sup>272</sup> It would appear that the Senate version implicitly eliminates this requirement, if an extradition treaty between the United States and the requesting state provided that probable cause need not be established. Since such language in a treaty would draw public attention and criticism, and if ratified would risk to be declared unconstitutional, the Administration has phrased this provision of the Senate version in such a way that a treaty could simply be silent on the requirement of probable cause (as is the case in a new treaty with Italy signed in 1983 but not yet ratified by the Senate), so that the Government could argue that the lack of explicit statutory language eliminates the requirement of probable cause unless required by treaty. The constitutionality of the requirement of probable cause for extradition will certainly arise in this instance. Surely if the fourth amendment requires probable cause for the relator's arrest it is difficult to conceive how that same requirement will be not deemed constitutionally necessary for extradition,<sup>273</sup> unless the relator waives it under Section 3193 of the "Act."

Under the House version's provision however it could be argued that the requirement of probable cause need not be met if the applicable treaty ratified subsequent to the "Act" specifically excludes it. However the legislative history of the bill notes that the provision is intended to incorporate the constitutional dimension of probable cause into the extradition procedure, by stating that such incorporation is "consistent with constitutional requirements under domestic law."<sup>274</sup> Thus, for the House unlike the Senate, the requirement of probable cause is presumably a minimum standard below which an extradition treaty cannot fall. This is an issue which is very likely to be litigated for some time to come. Nevertheless even in the House version it is not explicitly stated in the text, in order to accommodate the Administration's desire to eliminate the requirement if not by legislation then by treaty, or through ambiguity permitting such judicial interpretation.

The applicability of the requirement of probable cause also raises questions under the "Act" where the basis of the extradition request is a multilateral international criminal law convention containing an extradition clause and to which the United States is a party.<sup>275</sup> If such a treaty is deemed applicable<sup>276</sup> presumably no probable cause would be required and the constitutionality of such a practice would be questionable.<sup>277</sup> The Senate version would allow such a situation, while the House version would not for reasons stated above. A further complication can arise if probable cause is not statu-

torily required: if the offense for which extradition is requested is not included in the bilateral extradition treaty between the U.S. and the requesting state but the treaty requires probable cause and the said offense is found in an applicable multilateral international criminal law convention which does not require probable cause, will the bilateral extradition treaty control with regard to probable cause? The answer is likely to be in the positive even though the "Act" does not address this question on the theory that the basis for the request is the bilateral treaty, and the multilateral treaty is merely in the nature of a supplement to the list of extraditable offenses. While this writer does not favor this eventual approach, as a better one would be to rely on the multilateral treaty and the legislation without regard to the bilateral treaty, it is most likely to be urged by the Administration.

## 2. Evidentiary Standards

The essence of probable cause rests in the evidentiary standards applied, and in this respect the "Act" and the legislative history of all versions in the Senate and House are very sparse on these important question on which most extradition cases turn.

Both versions of the "Act" allow the court to consider hearsay evidence.<sup>278</sup> This is merely a codification of existing extradition practice<sup>279</sup> and is consistent with federal and state criminal procedures for the issuance of warrants.<sup>280</sup>

However, in relying on hearsay for probable cause, courts may be faced with new constitutional tests.<sup>281</sup>

In the typical extradition case, reliability and credibility of the source will usually pose no problem as long as the statements submitted from the requesting state were made under oath. However, courts have not been true to the constitutional requirements where they have considered unsworn statements without even mentioning the credibility of the source.<sup>282</sup> A review of the jurisprudence concerning the test of "underlying circumstances," which allows the judge to exercise independent judgment of the sufficiency of the evidence presented, reveals that this burden has generally been met.<sup>283</sup> It remains to be seen what test is formally incorporated into the determination of probable cause to extradite, and whether or not the evidentiary standard is more or less stringently applied.<sup>284</sup> The question however is not so much what the government has to prove and by what legal standard, for that has not been a serious problem for the government (although it has caused delays and difficulties in relations with requesting states not accustomed to common law requirements of "probable cause"), but what evidence the relator is entitled to present in defense or rebuttal.

The critical distinction between the magistrate's initial finding of probable cause to arrest and the magistrate determination of probable cause to extradite is that at the extradition hearing a relator may not introduce evidence to rebut probable cause which is in the nature of a defense, but only



evidence which clarifies or explains the evidence presented against him.<sup>285</sup> The existing standard which the "Act" ostensibly statutorily establishes is that a relator cannot introduce evidence which would tend to show that he is not guilty of the crime charged either by contradicting the evidence submitted against him or by establishing an alibi.<sup>286</sup>

The House version of the "Act" broadens existing jurisprudence by expressly allowing a relator "to introduce evidence with respect to the issues before the court."<sup>287</sup> The legislative history indicates that this statutory provision is intended to permit the introduction of evidence "relevant" to the issues before the court.<sup>288</sup> Although there is no indication as to the precise meaning of "relevant," reference by analogy would have to be made to the Federal Rules of Evidence to explain the breadth and application of such "relevant" evidence.<sup>289</sup>

Since the only issue expressly not before the court is the guilt or innocence of the relator, both versions of the "Act" erode by inference the existing judicially created rule that disallows contradictory evidence. Thus, a relator may be permitted to introduce evidence which attacks the truthfulness of the factual allegations presented by the U.S. Government on behalf of the requesting state. In addition to this statutory interpretation, there is strong constitutional authority, in Franks v. Delaware,<sup>290</sup> to support the proposition that a relator has the right to introduce evidence to contradict falsehoods which are contained in affidavits presented against

him, if the defendant makes "a substantial preliminary showing" that a false statement was knowingly and intentionally, or with a reckless disregard for the truth, included by the affiant, and if the allegedly false statement was necessary to the issuing magistrate's finding of probable cause. In that case a hearing must be held; if the defendant then establishes the allegation of perjury or reckless disregard by a preponderance of the evidence, and if the remaining content of the affidavit is insufficient to establish probable cause, then the warrant must be voided.<sup>291</sup> It must be noted however that falsehoods due to negligence or innocent mistake are not susceptible to challenge.<sup>292</sup> Franks-like situations have not arisen in extradition proceedings, if for no other reason than the fact that no court ever allowed the relator the opportunity to present evidence or seek discovery leading to such a conclusion because of the narrowly interpreted evidentiary openings for the relator. Under the House version however such evidence would be "relevant" and thus admissible, and if "relevant" might open an avenue for discovery that the court could not deny the relator.

#### D. Defenses to Extradition

Although there are a number of defenses to extradition which could have been included in the "Act,"<sup>293</sup> the Senate and House bills provide for only a few. Both contain a provision regarding the political offense exception to extradition<sup>294</sup> and for defenses included in the applicable treaty.<sup>295</sup> The House version also allows for the defense of lapse of the

statute of limitations, even if not included in the applicable treaty.<sup>296</sup>

### I. The Political Offense Exception

The "Act's" provisions for so few defenses is contrary to the practice of most countries in the world.<sup>297</sup> In addition, it is silent with respect to a controversial issue which has been argued before a number of federal district and circuit courts, namely opposition to the court's exercise of jurisdiction when the presence of the relator is due to an unlawful seizure abroad.<sup>298</sup> The "Act" presumably leaves this question to the development of U.S. jurisprudence.

The political offense exception was the most extensively debated issue at congressional hearings on all the proposed bills.<sup>299</sup> Both versions define the political offense exception by stating those acts which cannot be considered a political offense. In both the Senate and House bills, the following offenses may not be considered political offenses:

(1) an offense within the scope of the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on December 16, 1970;

(2) an offense within the scope of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, signed at Montreal on September 23, 1971;

(3) a serious offense involving an attack against the life, physical integrity, or liberty of internationally protected persons (as defined in section 1116 of this title), including diplomatic agents;

(4) an offense with respect to which a multilateral treaty obligates the United States to either extradite or prosecute a person accused of the offense;

(5) an offense that consists of the manufacture, importation, distribution, or sale of narcotics or dangerous drugs; or

(6) an attempt or conspiracy to commit an offense described [above] . . . , or participation as an accomplice of a person who commits, attempts, or conspires to commit such an offense.<sup>300</sup>

The offense of rape may not be considered a political offense under any circumstances in the Senate bill; under the House bill, however, it may be considered a political offense in "extraordinary circumstances."<sup>301</sup> Both versions of the "Act" provide that the following conduct may be considered a political offense in "extraordinary circumstances":

(1) an offense that consists of homicide, assault with intent to commit serious bodily injury, kidnapping, the taking of a hostage, or serious unlawful detention;

(2) an offense involving the use of a firearm (as such term is defined in section 921 of this title) if such use endangers a person other than the offender;

(3) an attempt or conspiracy to commit an offense described [above] . . . , or participation as an accomplice of a person who commits, attempts, or conspires to commit such an offense.<sup>302</sup>

By defining the political offense exception through examples rather than through generic definitions, both versions may force the courts into a difficult position through insufficient flexibility in determining the validity of the relator's political motives in committing the offense. Instead, the "Act" should define the "purely political offense" as a general defense and the "relative political offense" as a qualified defense with the exclusion of international crimes

save for exceptional circumstances as the House version did.<sup>303</sup>

A "purely political offense" is still a defense under the "Act," but only by implication. The offense itself is labelled a crime because it constitutes a subjective threat to the state's political, religious or racial ideology or its supporting structure, or both.<sup>304</sup> The offense, however, has none of the elements of a common crime, where a private wrong has been committed through the injury to private persons, property or interests. Treason, sedition, and espionage are offenses directed against the state itself and are therefore by definition a threat to the state's existence, welfare, and security. If such an act is linked to a common crime, however, it loses its purely political character and no longer benefits from the defense.

In contrast the "relative political offense"<sup>305</sup> is almost entirely eliminated in the Senate version because it contains an element of violence which creates a private wrong. The relative political offense can be an extension of the purely political offense, or it can be a common crime prompted by ideological motives. In determining whether an act constitutes a relative political offense, three factors should be taken into account: (1) the degree of the actor's political involvement in the ideology or movement on behalf of which he has acted, his personal commitment to and belief in the cause on behalf of which he has acted, and his personal conviction that the means (the crime) are justified or necessitated by



the objectives and purposes of the ideological or political cause; (2) the existence of a link between the political motive (as expressed above) and the crime committed; (3) the proportionality or commensurateness of the means used (the crime and the manner in which it was performed) in relationship to the political purpose, goal, or objective to be served; and (4) that the relator's political motives and goals predominate over his intention to commit the common crime.<sup>306</sup> These criteria are the embodiment of the jurisprudence of the United States on the political offense exception,<sup>307</sup> but both the Senate and House versions seem to ignore the need for simplicity, clarity, and preservation of basic human rights protections which when abused may leave no other recourse to an individual than to engage in an act of violence and thus be extraditable.

International crimes are the exception to the political offense exception--they are extraditable offenses which are not to benefit from the political offense exception,<sup>308</sup> but the question still arises as to whether or not some "exceptional circumstances" (as the House version describes it) which would warrant exclusion. International crimes are offenses against the Law of Nations or delicti jus gentium and by their very nature affect the world community as a whole. As such, they should fall within the political offense exception because, even though they may be politically connected, they are in derogation to international law.<sup>309</sup>

International crimes are those so declared explicitly or implicitly in multilateral international conventions. At present these crimes are: aggression; war crimes; unlawful use of weapons; genocide; crimes against humanity; apartheid; crimes relating to international air communications; threat and use of force against internationally protected persons; taking of hostages; unlawful use of the mails; drug offenses; falsification and counterfeiting; theft of national and archaeological treasures; bribery of foreign public officials; interference with submarine cables; international traffic in obscene publications.<sup>310</sup> Theoretically international crimes are therefore excluded from the political offense exception irrespective of the circumstances under which they occurred, but it certainly can be conceived that under certain circumstances they could be subject to some special consideration. One such example is where an individual is persecuted for political, racial or religious reasons and his life or liberty is in serious jeopardy, and such individual by seeking to escape commandeers an aircraft without cause risk or harm to others. Should that type of situation, which could technically be labelled hijacking, receive some consideration excluding it from the exception to the exception? The Senate version makes no such consideration, while the House version does.

History teaches us that certain regimes at times create conditions which are so deprivatory of minimum standards of human rights that a person subjected to such conditions has no

alternative but to seek redress or even escape except by means which necessitate the resort to some violent conduct. Under the legislation, such persons subjected to these conditions would not benefit from the "political offense exception" and would be returned to the requesting state where they are likely to be subjected to prosecution.

Only those international crimes embodied in treaties ratified by the United States come under this category in the "Act." In addition, both bills provide that except in "extraordinary circumstances" a violent act shall not constitute a political offense if it is "an offense with respect to which a treaty obligated the United States to either extradite or prosecute a person accused of the offense." The offense of "war crimes"--i.e., "grave breaches" of the Geneva Conventions of August 12, 1949<sup>311</sup>--are not included in the enumerated exceptions, but should have been. Such offenses could be interpreted as within the ambit of this subsection, because the United States is a party to the Geneva Conventions, which obligate the United States to prosecute or extradite individuals who have committed grave breaches of the Conventions. To avoid unnecessary ambiguity, a specific statement should have been made to exclude such violations, namely: "grave breaches of the Geneva Conventions of August 12, 1949 and any amendments thereto to which the United States may become a party."<sup>312</sup>

Prescinding from certain aspects of the customary law of

armed conflicts,<sup>313</sup> the Geneva Conventions of August 12, 1949 differentiate between various levels of hostilities and distinguish between two general types of hostilities: international armed conflicts, and non-international armed conflicts (i.e., internal conflicts).

Under the Conventions, acts of violence committed in the context of international armed conflicts cannot be considered political crimes for which extradition may be denied through the application of the "political offense exception." Instead, violent acts in this context are either justified and therefore not criminal, or they are unjustifiable and are "grave breaches" or "war crimes" for which extradition or prosecution is required. Whether the violent act is to be deemed a crime depends on whether the act violated the terms of the Geneva Conventions. If the act of violence conforms to the requirements of the Conventions, it is not a crime; thus, extradition of an individual who has committed such an act cannot be granted because it is justifiable under international law and therefore could not be a crime under United States law, so that the requirement of dual criminality, Section 3194, would not be fulfilled.

Acts of violence which are committed in the contexts of internal conflict, on the other hand, may be considered within the scope of the "political offense exception." These contexts include: (1) internal armed conflicts; and (2) internal civil strife.

Acts of violence committed in the context of internal armed conflicts are regulated by Common Article 3 of the Geneva Conventions. This article prohibits acts such as killing, torturing or taking hostage individuals who are not actively engaged in the armed conflict, such as the wounded, sick, shipwrecked, and civilians. Article 3 does not provide that such acts are to be considered criminal acts, however; furthermore, it does not provide that other acts of violence are to be deemed justifiable. Instead, it leaves this determination to states' application of their national criminal laws and to their definitions of the political offense exception in extradition treaties.<sup>314</sup> Thus, the "political offense exception" becomes relevant when an act of violence which does not violate Article 3 has been committed. Because the United States is a party to the Geneva Conventions, the "Act" should have been drafted such that it was consistent with these Conventions by providing that "extraordinary circumstances" include those situations wherein an act of violence has been committed in the course of an internal armed conflict as provided under Common Article 3 to the Geneva Conventions of August 12, 1949 and is deemed permissible under the terms of these Conventions.

Acts of violence which are committed during periods of civil strife are not regulated by the Geneva Conventions; instead, they are regulated solely by national criminal laws and are therefore subject to the existing meaning of the section's exceptions to the "political offense exception." Thus,



the "Act's" treatment of the political offense exception is inadequate. The Senate version provides for the "purely political offense" exception only by implication, and eliminates entirely the "relative political offense" when connected with a crime of violence. This is, with the exception of totalitarian regimes, one of the most restrictive legislative formulations in the world,<sup>315</sup> and was severely criticized by almost every witness before the Senate<sup>316</sup> or House<sup>317</sup> except for government representatives<sup>318</sup> and of course those witnesses suggested by them.<sup>319</sup> As to international crimes they too are entirely excluded from consideration as a political offense exception in the Senate version and the later House version, but included in the House version under the condition that it be due to "extraordinary circumstances,"<sup>320</sup> though this House bill does not define it, leaving it open for future jurisprudential development which by examining the House legislative interpretation would not change existing judicial standards.<sup>321</sup>

## II. The Lapse of Statute of Limitations

Although the House bill provides for the defense of the statute of limitations, the Senate version leaves the defense available to those enumerated in the treaty. Nevertheless it can be presumed that if the applicable treaty does not specify a particular defense, the courts could rely on scattered precedents and follow the emerging contemporary trend of relying on U.S. law<sup>322</sup> in order to find the applicability of a particular defense.

### III. Double Jeopardy

The "Act" does not include an explicit provision on the defense of double jeopardy,<sup>323</sup> thus failing to recognize jurisprudence holding that the defense of double jeopardy is validly raised as a bar to extradition, when the extradition request is based on the same or substantially the same crime as that for which the relator has been prosecuted, convicted or acquitted.<sup>324</sup> Whether the legal basis of this defense in U.S. law is found in the Eighth Amendment or the doctrine of res judicata, it embodies the principle ne bis in idem recognized in various multilateral conventions.<sup>325</sup>

### IV. Immunity from Prosecution

In addition, the legislation does not take into account current U.S. case law holding that a relator cannot be extradited if he was granted immunity or entered a negotiated guilty plea with respect to conduct which is the same or substantially the same as the one giving rise to the criminal charge for which extradition is sought. Because constitutional rights supersede obligations under a treaty, extradition in such an instance cannot be granted unless the plea is vacated.<sup>326</sup>

#### 16. Burden of Proof

The House version provides for detailed allocation of burden of proof concerning various issues, unlike existing legislation and unlike the Senate version. It places the burden of proving "probable cause" on the government by a

preponderance of the evidence but places the burden of raising a defense on the relator in accordance with Federal Rules of Evidence<sup>327</sup> if the evidence supports reasonable belief of the existence of the defense. Thereafter, the burden shifts to the government to disprove the defense, although no standard is provided. The government has the duty to prove the existence of a treaty for which the court is not required to take judicial notice, but no standard is provided. In the Senate version there is no such allocation of the burden of proof except in bail where it rests on the relator to prove, presumably to the satisfaction of the court that "special circumstances" exist.<sup>328</sup> The House version places the burden of proof for release on the relator.<sup>329</sup> Nothing in the "Act" refers to the seizure and introduction of evidence in violation of constitutional rights and standards applicable to federal and state criminal proceedings.

#### 17. Certification of Court's Findings of Extraditability

Unlike existing legislation,<sup>330</sup> the "Act" requires the court upon completion of the hearing to state its reasons for its findings as to each charge or conviction contained in the complaint.<sup>331</sup> This is a very laudable provisions in that it establishes the basis for the appeal.<sup>332</sup>

Upon a finding of extraditability the court must certify a transcript of proceedings to the Secretary of State.<sup>333</sup> Thus, it is not only the court's order containing an opinion including findings of facts and conclusions of law which must

be sent to the Secretary of State, but also a a certified copy of the entire transcript of the proceedings.

Under the Senate bill, if the court finds that the relator is not extraditable, it must certify its findings and an "appropriate report" to the Secretary of State.<sup>334</sup> In this instance, certification of the transcript of the proceedings is not required. Under the House version, the court must certify its findings to the Secretary of State. The House bill accords to the judiciary the discretion to send to the Secretary of State either a transcript of the proceedings or an "appropriate report."<sup>335</sup>

The House version further provides that the relator can petition the court to dissolve its order and dismiss the complaint if the Secretary of State does not reach a decision as to his surrender within 45 days from the date of the Secretary of State's receipt of the certified order and transcript of proceedings (excluding any delays caused by judicial proceedings).<sup>336</sup> The court is required to grant such a petition "unless the Attorney General shows good cause why such petition should not be granted."<sup>337</sup>

The Senate bill contains a somewhat different provision regarding limitations on detention pending removal. It states that the relator may petition the court for his release, but not a dissolution of the court's order and a dismissal of the complaint, if "the Secretary of State does not order the person's surrender, or decline to order the person's surrender, within forty-five days after [the Secretary's] receipt of the

court's findings and the transcript of the proceedings.

. . . "338

In effect this is another statutory provision akin to a right to a speedy trial though in this case it is after adjudication. It is mandatory and not peremptory, which means that the release by virtue of petition for dissolution of the order can be automatically granted, unless the court grants the Secretary of State a reasonable extension of time to achieve the surrender or "good cause" is shown. This provision places a higher burden on the Secretary of State to effectuate the transfer even though in some instances the circumstances may be beyond the control of the Secretary. The court may of course grant the Secretary a reasonable extension of time. A problem with this provision is that it does not allow the Secretary enough time to take into account considerations within his executive discretion such as matters pertaining to conditional extradition and other humanitarian factors or political factors (stated specifically in other sections of the "Act" in addition to his general authority under constitutional executive discretion), nor does it allow enough time for the Secretary of State to conclude negotiations on these matters with the appropriate governments.

#### 18. Reviewability

Unlike existing legislation which does not provide for appeals, the "Act" in Section 3195 provides that review of extradition decisions are by means of an appeal.<sup>339</sup> This is a novel feature of the "Act." What is meant by review is of



course a decision by the judiciary after a hearing with findings holding that the requested person is extraditable.

Whereas under existing jurisprudence, review is limited to a petition for a writ of habeas corpus, this section establishes appeal for the relator and for the Government as a matter of right, and thus purports to exclude habeas corpus as a means for review. Constitutional requirements however stand in the way of excluding habeas corpus entirely.<sup>340</sup> The legislative intent is to achieve three objectives: (1) to afford the government a right of appeal, (2) to exclude habeas corpus, and (3) to expedite the review process.<sup>341</sup>

The section gives the government an opportunity it did not have in the past to have a decision of non-extraditability reconsidered.<sup>342</sup> The Senate bill specifies that the appeal is to be in accordance with Federal Rules of Appellate Procedure 3 and 4(b),<sup>343</sup> while the House version provides simply that the Federal Rules of Appellate Procedure applicable to criminal cases shall apply, without specification to particular rules.<sup>344</sup> It is interesting to note once more how the "Act" brings extradition proceedings within the fold of criminal proceedings though it goes to great lengths in its provisions as well as in the legislative history to assert that extradition proceedings are sui generis and are not in the nature of criminal proceedings.<sup>345</sup>

The section provides that the initiation of appeal is by way of a notice of an appeal.<sup>346</sup> Both versions of the "Act" require that the appeal is to be heard "as soon as practica-

ble"<sup>347</sup> after the filing of such notice. The House bill, in addition, requires that the appeal is to be heard "promptly" when the relator has not been released pending determination of the appeal.<sup>348</sup> These requirements that the appeal be held on an expedited basis indicate the legislative intent that the extradition process be handled in a swifter manner than it has been heretofore.<sup>349</sup>

Both the Senate and House bills provide for the relator's release pending the appeal.<sup>350</sup> Generally, if the relator was found extraditable by the lower court, he cannot be released unless he satisfies specified criteria.<sup>351</sup> If he is found not extraditable by the lower court, however, he is to be released unless the Attorney General satisfies specified criteria.<sup>352</sup> The two versions of the "Act" differ on these applicable criteria.

Under the Senate bill, if the relator was found extraditable by the lower court, he will be held in detention unless he can demonstrate "special circumstances."<sup>353</sup> Under the House bill, if the relator was found extraditable by the lower court and the appeal has been taken by either party, he will be held in detention unless he can demonstrate by a preponderance of the evidence that (1) he "does not present a substantial risk of flight"; (2) he "does not present a danger to any other person or the community"; (3) "no relationship with a foreign state will be jeopardized with respect to a treaty concerning extradition"; and (4) the probability of success of his appeal is "great."<sup>354</sup>

If the relator is found not extraditable by the lower court, the Senate version provides that he is to be released pending the appeal "unless the court is satisfied that [he] is likely to flee or endanger the safety of any other person or the community."<sup>355</sup> In this instance, the court is also directed to "impose conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community."<sup>356</sup> The House bill states that if the relator was found not extraditable by the lower court and if the appeal is brought by the government, the relator is to be released "unless the Government shows by a preponderance of the evidence" that the relator if released: (1) presents a substantial risk of flight; (2) presents a danger to any other person or the community; (3) will jeopardize a relationship with a foreign state with respect to a treaty concerning extradition; and (4) that the probability of success of the Government's appeal is great.<sup>357</sup>

Both versions of the "Act" provide that the circuit court of appeals shall have jurisdiction to review on appeal all matters pertaining to extraditability.<sup>358</sup> Thus the appellate courts can consider whether or not the lower court had subject matter jurisdiction to conduct an extradition hearing, whether or not the lower court had in personam jurisdiction over the relator, whether or not there is a treaty currently in force which applies to the request for extradition, and whether or not the crime charged falls within the terms of the applicable treaty. These issues are all presently considered under

habeas corpus review;<sup>359</sup> the new direct appellate procedure should not change their reviewability including the review of the lower court's determination of the existence of probable cause to believe that the relator has committed the crime charged and the sufficiency of the evidence.

Under existing standard of habeas corpus review, stated in Fernandez v. Phillips, a magistrate's finding of probable cause will not be overturned if there is "any evidence" in the record which supports that finding.<sup>360</sup> Under the "Act" when an appellate court considers the probable cause issue on direct appeal, the standard of review applicable to all warrant cases will be used, and a magistrate's finding of probable cause will be given "great deference."<sup>361</sup> The change in reviewing standard is not evidenced by the differing verbal formulation, but by the more searching appellate examination of probable cause found in cases raising the question in the context of the Fourth Amendment<sup>362</sup> rather than the extradition context.<sup>363</sup> Presumably such matters are limited to questions of law though there will inevitably be some mixed questions of law and fact. The Federal Rules of Appellate Procedure and the jurisprudence of United States courts concerning reviewability of issues on appeal in criminal cases will likely be controlling.<sup>364</sup>

While purporting to restrict reviewability by means of petitions for habeas corpus, the "Act" does not entirely preclude it if "the grounds for the petition or other review could not previously have been presented."<sup>365</sup> In this respect

it is assumed that federal rules and the court's interpretation thereof concerning petitions for habeas corpus would apply as with other criminal cases.<sup>366</sup> The House version provides for an additional grounds for habeas corpus, if "the court finds good cause existed for not taking the appeal."<sup>367</sup> The House bill does not define "good cause"; presumably the analogy to criminal cases would be appropriate.<sup>368</sup> The second ground concerns issues that have not been presented on appeal or have been discovered subsequently.

Furthermore, habeas corpus petitions will also be the means resorted to for challenging probable cause for arrest and bail prior to the extradition hearing.<sup>369</sup> As a result, the legislation's provision will unduly lengthen extradition proceedings by allowing for an appeal which concededly benefits the Government, to which habeas corpus proceedings will be added.

The "Act" does not discuss any post-trial motions which exist under the Federal Rules of Criminal Procedure,<sup>370</sup> and it is unclear what the courts might do about their applicability.<sup>371</sup> Surely there are sufficient references to these rules in the legislation and its history for the court to find authority to fill the gap between the hearing's order and the appeal.<sup>372</sup> On the other hand the courts may apply the construction rule expressio unius est exclusio alterius.<sup>373</sup> Under the House version, the Supreme Court could resolve this problem under its rule-making authority stated in Section 3199(f).<sup>374</sup>



# 19. Executive Discretion to Deny Extradition

The "Act" unlike existing legislation<sup>375</sup> specifically provides for executive discretion to deny a foreign state's extradition request if either (1) the foreign state is seeking extradition in order to prosecute or punish the requested individual because of his political opinions, race, religion, or nationality;<sup>376</sup> or (2) the relator's extradition would be incompatible with humanitarian considerations.<sup>377</sup> Such executive discretion is to be exercised by the Secretary of State and is not subject to judicial review. The "Act" thus specifically formalizes executive discretion even though it is within the executive's constitutional authority in that it is a matter of foreign relations.<sup>378</sup>

These provisions are complementary to the rule of non-inquiry, recognized in the United States through judicial case law which requires that the extradition judge or magistrate cannot inquire into the political motives of the requesting state and the punishment to which the relator may be subjected upon return.<sup>379</sup>

The inclusion of such provisions, however, creates anomalies in U.S. law which could lead to incongruous or unjust results.

Both the Senate and House bills contain identical provisions that the Secretary of State has the discretion to determine whether a requesting state is seeking extradition for the purpose of prosecuting or punishing a person because of "such person's political opinions, race, religion, or national-

ity."<sup>380</sup> Such a decision is nonreviewable under the Administrative Procedure Act.<sup>381</sup> The content of such a judgment and its application to a person about whom such a decision is to be made are the same as under the terms of the 1967 Protocol Amending the 1951 Refugee Convention,<sup>382</sup> which is embodied in the 1980 Refugee Act.<sup>383</sup> However, the language of the "Act" is different from that of the 1967 Protocol and the above-mentioned United States legislation,<sup>384</sup> and this diversity could produce conflicting judicial and administrative results. Furthermore, the procedures established under the 1980 Refugee Act<sup>385</sup> provide for procedures under the Immigration and Nationality Act<sup>386</sup> and the Immigration and Naturalization Service which precede the use of discretion by the Secretary of State. Since there is already an established procedure for the determination of whether an individual is entitled to be considered a political refugee consistent with international treaty obligations, it would have been preferable if the "Act" had adopted the same substantive requirements and procedures set forth in other United States legislation. Then, rather than having the Secretary of State decide the issue at his discretion, after the court decides on the relator's extraditability without considering his claim to status as a political refugee, the court could have directed the relator to file for political asylum under the 1980 Refugee Act. The court would have then withheld the final surrender order pending the determination of the Immigration and Nationality Service of whether the individual were en-

titled to be considered a political refugee within the meaning of United States law. If he were deemed eligible for the status of political refugee, then the surrender order would not issued; the order of extraditability would have been reopened and a finding of non-extraditability entered. If he were found ineligible for the status, the court could have issued the surrender order. There was no need for any additional language in the Act to confer discretion upon the Secretary of State, since he can rely on "executive discretion" to refuse surrender of a person certified extraditable by the courts.<sup>387</sup>

In addition, the bills provide that only the Secretary of State in his own, unreviewable discretion may deem that the return of a relator to a requesting state is "incompatible with humanitarian considerations."<sup>388</sup> This provision is in keeping with long-standing United States practice that the court not inquire into the prospective treatment that a relator may face upon return to a requesting state.<sup>389</sup> It is to be noted, however, that certain practices of corporal punishment or cruel and inhuman punishment are contrary to United States public policy as well as contrary to internationally protected norms of human rights.<sup>390</sup> To specifically state that discretion is given the Secretary of State to make such determinations (although he has such "executive discretion") might place the United States in a position of embarrassment vis a vis a foreign government and could burden relations between the United States and that government. At

hearings before the House Foreign Affairs Committee on H.R. 6046, this writer suggested three procedures that would have shielded the United States government from having to make such decisions which may impair its foreign relations with such a state.<sup>391</sup> The first procedure is to condition extradition in certain cases to the non-applicability of such treatment or punishment which would be contrary to United States law and policy and internationally protected human rights norms. The analogy in this case is to the practice of a number of states which prohibit extradition where the death penalty may be imposed.<sup>392</sup> It is possible in such instances that the requesting state undertakes not to mete out such a punishment and therefore eliminate the obstacle. The same could be done with respect to corporal punishment, torture, and the like.

The second alternative is to conditionally extradite the relator on the condition that upon his conviction he would be returned to the United States as a transferred prisoner so that his sentence would be executed in the United States in accordance with U.S. law.<sup>393</sup> The third alternative is to deny extradition. The "Act" includes all of the above but the determination is still left to the exclusive discretion of the Secretary of State without judicial inquiry.<sup>394</sup> The importance of judicial determination in this case, as in other politically sensitive areas, is that it shields the executive from the political consequences of such a determination when made in the face of a foreign state's extradition request.

20. Surrender of a Person Held Extraditable to a Requesting State

Both versions of the "Act" contain similar provisions for the procedure for surrendering an individual found extraditable.<sup>395</sup> Both reemphasize the Secretary of State's discretion to extradite, to condition extradition, or to deny extradition, thus embodying statutorily the unreviewable discretionary powers of the Secretary.

The Senate and House bills also clearly state that the Secretary may surrender a national of the United States even though such surrender is not specifically authorized by the applicable extradition treaty.<sup>396</sup> The Secretary is denied such authority only where the applicable treaty or where U.S. laws specifically prohibit it.<sup>397</sup>

The "Act" provides that the Secretary of State must notify the person held extraditable, the diplomatic representative of the foreign state, the Attorney General, and the court which ordered the person extraditable of his decision.<sup>398</sup> Under the House version, although it is the Secretary who negotiates the surrender and orders it, it is the Attorney General who in accordance with instructions from the Secretary of State performs the actual surrender of custody of the relator to the agent of the requesting government.<sup>399</sup> Both versions of the "Act" contain time limitations for the relator's surrender. Under the Senate bill, the Secretary of State must reach his decision within forty-five days after his receipt of the court's findings and the transcript of the proceedings.<sup>400</sup> If the Secretary orders the relator's sur-



render, he must be removed from the U.S. within thirty days following such order.<sup>401</sup> If either of these time limits is not satisfied, excluding any delays for judicial proceedings, the relator may petition the court for his release.<sup>402</sup> The court "may grant this petition unless the Secretary of State, through the Attorney General, shows good cause why the petition should not be granted."<sup>403</sup>

Under the House bill, the Secretary must also reach his decision within forty-five days from his receipt of the court's findings and the transcript of the proceedings.<sup>404</sup> The House version, similarly, also requires that surrender, if ordered by the Secretary, must be accomplished within thirty days from such order.<sup>405</sup> If either of these time limitations is not satisfied, excluding any delays for judicial proceedings, the relator may petition the court for dismissal of the complaint and dissolution of the court's order of extraditability.<sup>406</sup> Notice of such petition is to be made to the Secretary of State.<sup>407</sup> The bill specifies that the court "shall" grant the relator's petition, "unless the Attorney General shows good cause why such petition should not be granted."<sup>408</sup>

Both versions of the "Act" thus provide for an unusual and rather rigid requirement which is in the nature of a sanction imposed upon the requesting state for failure to take custody and remove the relator from the United States. Although they state that petitions can be filed by the relator, nothing precludes the Government--that is, the Attorney Gen-

eral acting on his own behalf or at the request of the Secretary of State--to petition the court which held the individual extraditable. It is unfortunate that the "Act" does not define "good cause," since this is a nebulous standard. The "Act" also leaves somewhat unclear whether the dismissal or release after thirty days is mandatory or peremptory considering that the Attorney General could oppose it upon a showing of "good cause." Furthermore, it is rather unusual that the tolling of the thirty days does not commence upon notice but upon an act which may not be communicated to the party expected to take measures depending upon it. It is also interesting to note that notice of the relator's petition for dissolution of the extradition order is to be sent to the Secretary of State, without mention of the need to also notify the Attorney General.

Thus, although the "Act" attempts to allocate roles to the Secretary of State and the Attorney General, it unfortunately is not as clear and comprehensive as it should. Nevertheless, it is quite likely that in practice it will not necessarily create confusion or conflict with respect to the roles of the Secretary of State and the Attorney General.

## 21. Transit Extradition

A section regarding transit extradition is included in the House version<sup>409</sup> but not in the Senate's.<sup>410</sup> It provides for cooperation between the United States and other governments in the transit extradition of persons going through United States territory. Such a provision is not present in

existing legislation. The procedure applies to individuals who have been found extraditable in a country other than the United States and who are being delivered to a country other than the United States but whose surrender required passage or transit through the United States. During such transit the person in question would be in the custody of agents of a foreign government and therefore held in custody in the United States without judicial authority. During such transit that individual could file a petition for a writ of habeas corpus charging that his detention in the United States is without legal authority. To avoid that, this provision seeks to create statutory authority for the Attorney General to hold a person in custody for not more than ten days until arrangements are made for the continuation of such person's transit. Though this provision had been recommended to the House and Senate by this writer<sup>411</sup> it was also recommended by this writer that the Attorney General obtain a court order based on some documentation and a request from the foreign government seeking permission for a transit, but that requirement was not included. The Act thus gives the Attorney General a right of detention without judicial process which on its face appears unconstitutional.<sup>412</sup> In any event it could be challenged by means of petition for a writ of habeas corpus.

## 22. Receipt of a Person from a Foreign State

The Senate and House versions of the "Act" contain virtually identical provisions in Section 3198 for the receipt of a person from a foreign state.<sup>413</sup> The section in both bills

provides for the authority of the Attorney General to appoint an agent to receive from a foreign government custody of a person accused of a federal, state, or local offense.<sup>414</sup>

While it would appear that this provision relates to the receipt of a person held extraditable to the United States pursuant to a treaty of extradition and a formal process, it is not so specified.<sup>415</sup> Consequently this provision may appear to simply allow the Attorney General to receive custody of any individual irrespective of whether this is accomplished within the framework of extradition. Presumably the courts in interpreting this provision will be controlled by the title of the "Act" and interpret it to be limited to receipt of custody of a person held extraditable to the United States.

In addition, the provision specifically authorizes receipt of a person accused of a federal, state, or local offense on the condition that such person shall be returned to the foreign state upon determination of the criminal proceedings held against him in the United States,<sup>416</sup> a procedure long advocated by this writer.<sup>417</sup> The purpose here is clearly to allow a person who is in the custody of a foreign government to be brought back to the United States for trial and to be returned to the foreign government for his detention there without having to await his release from detention by that government before commencing criminal proceedings against him in the United States. This clearly will assist prosecutions in the United States which might otherwise become stale if the individual is permitted to await determination of his

sentence in the foreign country before his return to the United States to face criminal charges.

Regrettably there is no reverse provision which permits the extradition of a person from the United States to a foreign government for the same purpose, though nothing precludes the conditional surrender of a person to a requesting state after an order of extraditability for purposes limited to his trial in that country and for his return thereafter to the United States for the execution of his sentence.

### 23. Dissolution of Extradition Order

Under the House bill, if after 45 days from the date of receipt by the Secretary of State of the certified copy of the transcript of the proceedings, the government, in this case the Attorney General, takes no appeal or if after 45 days after the issuance of final order of the appellate court has been entered, the Secretary of State has not decided to surrender the relator, the relator can petition the court with notice to the Secretary of State who informs the Attorney General (but no direct notice to the Attorney General) for dissolution of the extraditability order.<sup>418</sup> The Attorney General may then petition the court for an extension of time, presumably for "good cause" though the grounds are not defined and the court is admonished not to grant further extensions of time without caution.<sup>419</sup> This provision also resembles a speedy trial provision<sup>420</sup> but it is unclear whether it is mandatory or peremptory and while it appears reasonable for the United States to establish time limits and guidelines on



the surrender of individuals to requesting states, it would seem also appropriate that such time limits be couched in more discretionary terms, particularly if they are so short in duration.

#### 24. Rules of Court

The House bill, but not the Senate, contains a provision regarding rules of the court.<sup>421</sup> This section provides for the first time in the history of extradition legislation for the Supreme Court of the United States to prescribe rules of practice and procedure with respect to any and all proceedings under this "Act." Such rules of procedure and practice are not to take effect until presented to Congress by the Chief Justice of the Supreme Court or after the beginning of a regular session of Congress, but no later than the first day of May and until the expiration of 180 days after they have been thus reported. This legislative delegation of authority to the Supreme Court is to follow similar provisions concerning the Supreme Court's authority with respect to rules of practice and procedure in civil and criminal matters under the Federal Rules of Civil Procedure and Federal Rules of Criminal Procedure. It is therefore assumed that the delegation of authority being the same, its parameters are also to be the same.

This provision permits the Supreme Court to close the many legislative gaps in the "Act" discussed contextually above, and to clarify legislative ambiguities, thus avoiding protracted litigation and conflicting court decisions which

would keep the early cases under the Act in litigation for a number of years and defeat its avowed purpose of streamlining and accelerating the process. Because of the lacunae in the legislation as identified above, the rule-making power of the Supreme Court may truly become supplemental legislation. However in view of the many areas of the law competing for the Supreme Court's attention it is not very likely that it will intervene before the problems relating to this Act increase in number and lag in time. Hopefully the Advisory Committee will have the benefit of experienced scholars and practitioners.

#### 25. Costs

The "Act" provides that transportation costs, presumably those of the relator and witnesses, subsistence expenses of the same and translation costs incurred by the United States government with respect to an extradition request shall be borne by the requesting government unless otherwise specified by the applicable treaty.<sup>422</sup> Nevertheless, the Secretary of State has the unreviewable discretion to direct otherwise, in which case costs may be borne by the United States.<sup>423</sup>

#### 26. The Rule of Non-Inquiry and Conditional Extradition

The "Act" provides that if the return of the relator to the requesting state is "incompatible with humanitarian considerations," the Secretary of State will have the discretion (unreviewable under the Administrative review Act<sup>424</sup>) to determine whether the relator should be returned to the requesting state.<sup>425</sup> It thus adds nothing new to existing law

and practice, since the Secretary has "executive discretion" in any instance where extradition of a relator from the United States has been requested.<sup>426</sup>

United States courts have so far refused to inquire into the processes by which a requested state secures evidence of "probable cause" to request extradition, or the means by which a criminal conviction is obtained in a foreign state, or the penal treatment to which a relator may be subjected upon extradition. Even habeas corpus is not a valid means of inquiry into the treatment the relator is anticipated to receive in the requesting state.<sup>427</sup>

The test of the "rule of non-inquiry" is applied in cases where the relator is likely to encounter such treatment in the requesting state that it is likely to be deemed significantly offensive to the minimum standards of justice, treatment of individuals and preservation of basic human rights, as perceived by the requested state. Thus, the surrender of a relator whether a United States citizen or not is unimpaired by the absence in the requesting state of those specific safeguards available in the United States legal system and therefore no judicial inquiry into the requesting state's legal system is permitted.<sup>428</sup>

There is, however, increasing dicta in the court opinions to believe that the rule of non-inquiry could be eroded given the appropriate case.<sup>429</sup> This could arise in two types of cases: (1) where the evidence presented by a requested state is the product of a serious violation of due process (such as

torture), the court could give no weight or even refuse to admit that evidence; and, (2) where there is evidence that the individual may be subject to cruel, inhuman or degrading treatment in the requesting state, the court could refuse to order the relator's extradition. Such a holding could easily rely on existing international instruments binding upon the United States. Among these international instruments are: the Universal Declaration of Human Rights;<sup>430</sup> the International Covenant on Civil and Political Rights;<sup>431</sup> the Inter-American Convention on Human Rights<sup>432</sup> and others.<sup>433</sup>

Finally, it should be noted that the 1967 Protocol on Refugees no longer permits a court to rely on the rule of non-inquiry to refuse inquiry into the possible "persecution" of the relator once returned to the requesting State.<sup>434</sup>

Thus, it would have been preferable for the "Act" to provide for limited judicial inquiry into the treatment or punishment to which a relator may be subjected upon return to the requesting state. Such an amendment is suggested for two reasons: (1) the provision should take into account that certain practices of corporal punishment or cruel, inhuman, or degrading treatment or punishment are contrary to United States public policy as well as contrary to internationally protected norms of human rights; (2) the provision should not specifically state that discretion is given to the Secretary of State, because this could place the United States in a position of embarrassment vis a vis a foreign government and

could burden relations between the United States and that government.

For example, the "Act" could contain the following proposed language:

Upon a prima facie showing by the requested person that he or she is likely to be subjected to cruel, inhuman or degrading treatment or punishment, extradition shall not be granted unless the requesting state shall present to the Secretary of State satisfactory assurances that such treatment or punishment shall not be imposed; or where a treaty between the United States and the requesting state for transfer of prisoners exists, that the extradition shall be conditional upon the return of the relator upon conviction for the execution of the sentence in the United States. The Secretary of State shall negotiate these conditions in accordance with Section 3196 and their terms shall be presented to the court and made part of the order. Only in the most egregious cases shall the court deny extradition. The Secretary of State may in any event exercise his discretion after a finding of extraditability by the court.<sup>435</sup>

## 27. The Principle of Specialty and Re-Extradition

The "Act" contains no specific provision embodying this principle, which is well established in U.S. jurisprudence<sup>436</sup> and stands for the proposition that the requesting state which secures the surrender of a person can prosecute that person only for the offense for which he or she was surrendered by the requested state or else allow that person an opportunity to leave the prosecuting state to which he or she had been surrendered. The same limitation exists on re-extradition from an originally requesting state to another state.<sup>437</sup>



These requirements are designed to insure the United States that its treaty relations and legal processes are not used for a purpose different than the one which is specified in the applicable treaty.

The "Act" implicitly considers the applicability of the rule of specialty only in its section regarding the relator's waiver of the extradition hearing<sup>438</sup> but does not provide for the rule's applicability to other aspects of the extradition process. Although it can be presumed that this lack of clear legislative guideline does not affect jurisprudential precedent recognizing this principle, it could have been preferable to include in the "Act" a specific provision embodying it.

While the rule is ostensibly intended to benefit the extraditing state, as is reflected in the proposed texts of the "Act," it is also intended to protect the relator to prevent prosecution on the basis of physical presence without a showing of probable cause to the satisfaction of the requested state (in this case, the United States). The rule must also be interpreted in light of conditional extradition and re-extradition. The former applies in the case where the United States would only conditionally extradite a person for a specific crime.<sup>439</sup> The latter limits re-extradition to a third state without specific authorization from the originally requested state (in this case, the United States), without a showing of probable cause.

A proposed text is as follows:

A returned person shall not be prosecuted,  
punished or re-extradited while under

prosecution or punishment in the requesting state without the specific approval of the Secretary of State who may at his discretion authorize any variance in prosecution or punishment in the requesting state or re-extradition upon a showing of probable cause.440

28. Conclusion

The analysis made hereinabove shows the differences between the Senate and House versions, and their differences or conformity to existing legislation and existing jurisprudence. The House version goes beyond the Senate's in closing certain gaps, but even so, it is hoped that when the House considers the present bill or a revised version thereof that it takes into consideration some of the observations made herein, and certainly others that interested commentators may point out. This is a unique historic opportunity to enact new legislation that will provide for more effective and swift extradition proceedings without unduly sacrificing fundamental human rights embodied in international standards and in U.S. constitutional law and policy as interpreted and applied in criminal cases.

1. See S. 1639, 97th Cong., 1st Sess. (1981), introduced at 127 Cong. Rec. S10032 (daily ed. Sept. 18, 1981) [hereinafter referred to as S. 1639]. The provisions in the bill were originally introduced as part of proposed legislation to amend the federal criminal code. See S. 1630, 97th Cong., 1st Sess. (1980), introduced at 127 Cong. Rec. S9916 (daily ed. Sept. 17, 1981).

2. See H.R. 5227, 97th Cong., 2d Sess. (1982), introduced at 128 Cong. Rec. H9670 (daily ed. Dec. 15, 1981) [hereinafter referred to as H.R. 5227].

3. See The Extradition Act of 1981: Hearings on S. 1639 Before the Comm. on the Judiciary, 97th Cong., 1st Sess. (1981) [hereinafter referred to as Senate Judiciary Hearings on S. 1639].

4. See The Extradition Reform Act of 1981: Hearings on H.R. 5227 Before the Subcomm. on Crime of the Comm. on the Judiciary, 97th Cong., 2d Sess. (1982) [hereinafter referred to as House Judiciary Hearings on H.R. 5227].

5. S. 1639 was amended and reintroduced as S. 1940. See S. 1940, 97th Cong., 2d Sess. (1981), introduced at 127 Cong. Rec. S15101 (daily ed. Dec. 11, 1981) [hereinafter referred to as S. 1940]. H.R. 5227 was amended and reintroduced as H.R. 6046 and was entitled "The Extradition Reform Act of 1982." See H.R. 6046, 97th Cong., 2d Sess. (1982), introduced at 128 Cong. Rec. H1405 (daily ed. April 1, 1982) [hereinafter referred to as H.R. 6046].

6. See 128 Cong. Rec. S10880 (daily ed. Aug. 19, 1982).

7. See S. 220, 98th Cong., 1st Sess. (1983), introduced at 129 Cong. Rec. S385 (daily ed. Jan. 27, 1983) [hereinafter referred to as S. 220].

8. See H.R. 2643, 98th Cong., 2d Sess. (1983), introduced at 129 Cong. Rec. H2249 (daily ed. April 20, 1983) [hereinafter referred to H.R. 2643]. The Administration's views were conveyed to the Senate and the House by Michael Abbell, then Director, International Affairs Division, Department of Justice, and John Harris of that Division who prepared the Administration's drafts, and Daniel McGovern, then Deputy Legal Adviser, Department of State. S. 1639 and S. 1940 were introduced by Senator Strom Thurmond, Chairman of the Committee on the Judiciary; the principal resource person on those bills was Paul Summit, Chief Counsel of the Judiciary Committee. H.R. 5227 and H.R. 6046 were introduced by Congressman William Hughes, Chairman, Sub-Committee on Crime of the Committee on the Judiciary. The principal resource person on these bills was David Beier, Counsel, Committee on the Judiciary. S. 220, which was almost identical to S. 1940, was introduced by Senator Paul Laxalt, Chairman of the newly-created Sub-Committee on Crime Legislation to the Committee on the Judiciary.

The American Society of International Law contributed to the legislative drafting process in 1982 by convening a meeting of the principal resource persons of the Senate and House Committees on the Judiciary, the Senate Committee on Foreign Relations, representatives of the Departments of Justice and

State, and a number of experts to discuss the various contending views. The views of the Administration were more specifically embodied in the Senate bills. Other views, including many suggestions presented by this writer, found their expression in the House bills. It was the expectation of all concerned that if H.R. 6046 would pass the House, a conference on S. 1940 and H.R. 6046 would produce a new Act in 1982. But since the House bill was not passed in 1982, new Senate and House bills had to be introduced in 1983. This occurred in the Senate with S. 220, and in the House with H.R. 2643. There will eventually be a conference to reconcile differences between the two versions before a new Act could be enacted into law.

9. 18 U.S.C. §§ 3181-3195 (1976).

10. Act of August 12, 1848, ch. 167, § 5, 9 Stat. 302, 303 (established authority and procedures for judicial review of extradition requests).

11. Act of June 22, 1860, ch. 184, 12 Stat. 84 (required authentication of documents); Act of March 3, 1869, ch. 141, §§ 1-3, 15 Stat. 337 (established procedure for delivery of relator from U.S. to requesting state); Act of June 19, 1876, ch. 133, 19 Stat. 59 (provided that authenticated foreign documents are admissible into evidence); Act of August 3, 1882, ch. 378, §§ 1-6, 22 Stat. 215 (established fees and costs for extradition); Act of June 6, 1900, ch. 793, 31 Stat. 656 (specified extraditable offenses and established political offense exception); Act of June 28, 1902, ch. 1301 (judicial),



32 Stat. 419, 475 (provided for collection of costs from requesting state); Act of March 22, 1934, ch. 73, §§ 1-4, 48 Stat. 454 (established procedure for extradition to and from countries or territories controlled by the U.S.); Act of June 25, 1948, ch. 645, 62 Stat. 822 (codified existing practice not previously set forth in statute); Act of May 24, 1949, ch. 139, 63 Stat. 96 (amended list of extraditable offenses); Act of October 17, 1968, 82 Stat. 1115, Pub. L. No. 90-578, Title III, § 301(a)(3) (substituted "magistrate" for "commissioner" in extradition statutes).

12. International penal cooperation includes the processes of extradition, judicial assistance, and transfer of offenders. See generally 2 M.C. Bassiouni & V.P. Nanda, A Treatise on International Criminal Law (1973) [hereinafter referred to as Bassiouni & Nanda, International Criminal Law]; M.C. Bassiouni, International Criminal Law: A Draft International Criminal Code (1980) [hereinafter referred to as Bassiouni, International Criminal Code]. For a review of these procedures under U.S. law and practice, see generally M.C. Bassiouni, International Extradition in U.S. Law and Practice (2 vols. 1983) [hereinafter referred to as Bassiouni, U.S. International Extradition]. Extradition is a "system consisting of several processes whereby one sovereign surrenders to another sovereign a person sought after as an accused criminal or a fugitive offender." 1 Id., at Chap. I, §1, p. 1. The practice originated in early non-Western civilizations, and has now reached the point where it is a common

feature of bilateral, regional, and multilateral arrangements between states. See 1 id., at Chap. I, § 1, p. 2, and Chap. I, § 6. See also Bassiouni, "Common Characteristics of Conventional International Criminal Law," 15 Case W. Res. J. Int'l L. (1983) (forthcoming). The concept of the duty to prosecute or extradite originated in the writings of Hugo Grotius, who propounded the maxim aut dedere aut punire, which is more appropriately phrased as aut dedere aut judicare. See H. Grotius, De Jure Belli ac Pacis, Book 2, Chap. 21, §§ 3, 4 (1624). See also Bassiouni, U.S. International Extradition, supra note 12, at Chap. I, § 2. See generally Murphy, "The Grotian Vision of World Order," 76 Am. J. Int'l L. 477 (1982).

13. S. 1639, the first Senate bill introduced in the 97th Congress on U.S. extradition, was also introduced as part of S. 1630 to amend the federal criminal code. See supra note 1. S. 220, the first Senate bill introduced in the 98th Congress, was also introduced as part of S. 215 to amend the Bail Reform Act. See infra note 33.

14. See supra note 1.

15. S. Rep. No. 331, 97th Cong., 2d Sess. 3 (1982) (the Senate Judiciary Committee did not issue a report on S. 1639, but on the amended version of S. 1639 which was numbered S. 1940) [hereinafter referred to as Senate Judiciary Report on S. 1940].

16. See id. at 3 n. 1.

17. See Senate Judiciary Hearings on S. 1639, supra note 3.

18. See S. 1940, supra note 5.

19. Senate Judiciary Report on S. 1940, supra note 14.

20. See S. Rep. No. 475, 97th Cong., 2d Sess. 2 (1982) [hereinafter referred to as Senate Foreign Relations Report on S. 1940]; The Extradition Act of 1981: Hearings on S. 1940 Before the Comm. on Foreign Relations, 97th Cong., 2d Sess. (1982) [hereinafter referred to as Senate Foreign Relations Hearings on S. 1940].

21. Id. See also notes 31-32 and accompanying text infra.

22. See supra note 2.

23. See H.R. Rep. No. 627, Part I, 97th Cong., 2d Sess. 1 (1982) (the House Judiciary Committee did not issue a report on H.R. 5227, but on an amended version of H.R. 5277, which was numbered H.R. 6046) [hereinafter referred to as House Judiciary Report on H.R. 6046].

24. Id. at 3.

25. See House Judiciary Hearings on H.R. 5227, supra note 4.

26. See House Judiciary Report on H.R. 6046, supra note 22.

27. H.R. Rep. No. 627, Part II, 97th Cong., 2d Sess. (1982) [hereinafter referred to as House Foreign Affairs Report on H.R. 6046]. See The Extradition Reform Act of 1982: Hearings on H.R. 6046 Before the Comm. on Foreign Affairs, 97th Cong., 2d Sess. (1982) [hereinafter referred to as House Foreign Affairs Hearings on H.R. 6046].

28. See House Foreign Affairs Report on H.R. 6046, supra note 27.

29. Id. at 2.

30. Id. at 6 (Hon. Geo. W. Crockett, Jr.); id. at 7 (Hon. Paul Findley); id. at 8 (Hon. Arlen Erdahl). Subsequent to the House Foreign Affairs Committee's favorable reporting of H.R. 6046, several Members of Congress voiced strong objections to the bill on the floor of the House. Congressman Crockett proposed provisions to (a) amend the definition of a "political offense"; (b) give the judiciary the authority to deny extradition if it finds that the person if returned would be persecuted because of his "race, religion, nationality, membership in a particular group, or political opinion"; (c) impose upon the Secretary of State the duty to condition extradition upon compliance with international law, including international protection of human rights; (d) provide explicitly for the relator's right to petition the Secretary of State to refuse or condition his extradition; (e) provide explicitly for the "rule of specialty," which requires that the requesting state shall prosecute an individual only for those crimes for which extradition was granted; (f) require that a requesting state shall be represented only by private counsel at extradition proceedings in the United States. See 128 Cong. Rec. H6968-70 (September 14, 1982). Other Members of Congress, while not proposing specific amendments, voiced disagreement over substantially the same provisions with which Congressman Crockett took issue, most notably the "narrowly

defined" "political offense exception" and the perceived need to have the judiciary determine whether the relator, if returned, would be subjected to persecution because of religious, racial, or political beliefs. See 128 Cong. Rec. E4128 (daily ed. Sept. 13, 1982) (remarks of Hon. D. Edwards); id. at E4145, E4152 (daily ed. Sept. 14, 1982) (remarks of Hon. F. Stork; Hon. J. Conyers, Jr.); id. at E4179, E4189, E4192, E4200, E4201 (daily ed. Sept. 15, 1982) (remarks of Hon. A. Moffett, Hon. G. Studds, Hon. W. Fauntroy, Hon. P. Schroeder, Hon. S. Chisholm); id. at E4214, E4222, E4233, E4241, E4245 (daily ed. Sept. 16, 1982) (remarks of Hon. R. Wyden, Hon. B. Frank, Hon. W. Brodhead, Hon. D. Bonioz, Hon. B. Rosenthal). Congressman Hughes, sponsor of H.R. 6046 and Chairman of the Subcommittee on Crime in the House Judiciary Committee, responded to Cong. Crockett's proposed amendments in a letter to Congressman Crockett dated September 22, 1982. In that letter, Cong. Hughes defended the bill's definition of the political offense exception and failure to include political persecution in the court's determination of extraditability; took no issue with the proposals regarding conditional extradition to ensure the protection of the relator's human rights, petition to the Secretary of State, and the rule of speciality because he considered these proposals to be merely codifications of existing practice; and objected to the requesting state's use of private counsel.

31. 128 Cong. Rec. S10880-84 (daily ed. Aug. 19, 1982).

32. Id. at S10882-83.



33. S. 220, supra note 7. The bill was introduced both as a separate, independent bill and as part of a bill to amend The Bail Reform Act, S. 215, 98th Cong., 1st Sess. (1983), introduced at 129 Cong. Rec. S385 (daily ed. Jan. 27, 1983).

34. H.R. 2643, supra note 8.

35. Act of August 12, 1848, ch. 167, § 5, 9 Stat. 302, 303.

36. See supra note 11.

37. 27 F. Cas. 825 (No. 16,175) (D.S.C. 1799).

38. See 10 Annals of Congress 580-640 (1800), reprinted following U.S. v. Robbins, 27 F. Cas. 825, 833-70 (No. 16,175) (D.S.C. 1799).

39. For an historical analysis of the "political offense exception," see 2 Bassiouni, U.S. International Extradition, supra note 12, at Chap. VIII, § 2; C. Van den Wijngaert, The Political Offence Exception to Extradition (1980) [hereinafter referred to as Van den Wijngaert, The Political Offence Exception].

40. The Treaty of Amity, Commerce and Navigation with Great Britain (Jay Treaty), 19 November 1794, 8 Stat. 116, T.S. No. 105, reprinted in I W. Malloy, Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and Other Powers 490 (1910).

41. See In re Robbins, 27 F. Cas. 825, 827 (No. 16,175) (D.S.C. 1799).

42. 1 J. B. Moore, A Treatise on Extradition and Inter-State Rendition 550-51 (1891) [hereinafter referred to as Moore, Extradition].

43. In re Metzger, 17 F. Cas. 232 (No. 9,511) (S.D.N.Y. 1847). In Metzger, France requested that the U.S. extradite an individual charged with forgery in France. The judicial determination of Metzger's extraditability was made by Judge Betts in chambers, who found his extradition in order. The decision prompted considerable discussion over whether judicial review could be performed in chambers as opposed to in open court.

44. Ch. 167, § 5, 9 Stat. 302, 303. See In re Kaine, 55 U.S. (14 How.) 102 (1852), in which the Court expressly noted "[t]hat the eventful history of Robbin's case had a controlling influence . . . especially on Congress, when it passed the act of 1848, is, as I suppose, free from doubt." Id. at 112.

45. No. 80 Cr. Misc. 1 (S.D.N.Y., Aug. 13, 1981), aff'd, United States v. Mackin, 668 F.2d 122 (2d Cir. 1981). In Mackin, the United Kingdom's request that a member of the Provisional Irish Republic Army be extradited to the U.K. in order to face prosecution for the charge of attempted murder and related offenses he allegedly committed against a British soldier (dressed in civilian clothes) standing in a Belfast bus station was denied on the grounds that these charges were "political offenses" for which extradition could not be granted.

46. No. 3-78-1899 M.G. (N.D. Cal., May 11, 1979). In McMullen, the United Kingdom's request that a member of the Provisional Irish Republic Army be extradited to the U.K. in order to face prosecution for his alleged bombing of a British army installation in England was denied on the grounds that he was being sought for a "political offense" for which extradition could not be granted.

47. 641 F.2d 504 (7th Cir.), cert. denied, 454 U.S. 894 (1981). In Abu Eain, Israel's request that an alleged member of the Palestine Liberation Organization be extradited to Israel to be prosecuted for his alleged bombing of a bus in Israel was granted; the court refused to entertain the relator's defense that such charges constituted "political offenses."

48. See Senate Judiciary Hearings on S. 1639, supra note 3, at 2, 4, 8, 14 (testimony of M. Abbell, Dep't of Justice; D. McGovern, Dep't of State); Senate Foreign Relations Hearings on S. 1940, supra note 19; House Judiciary Hearings on H.R. 5227, supra note 4, at 26-27, 32 (testimony of R. Olsen, M. Abbell, Dep't of Justice; D. McGovern, Dep't of State); House Foreign Affairs Hearings on H.R. 6046, supra note 26.

49. See Senate Judiciary Hearings on S. 1639, supra note 3, at 30 (testimony of W. Hannay). The Senate Judiciary Committee, which supported the view that the political offense exception should be placed outside the court's jurisdiction, placed special emphasis on this testimony and written statement as "an excellent discussion of the political offense

exception to extradition and the impact of recent cases," which the Committee adopted as its view. See Senate Judiciary Report on S. 1940, supra note 14, at 14 nn. 59, 60, 15 n. 61.

50. In re Mackin, No. 80 Cr. Misc. 1 (S.D.N.Y., Aug. 13, 1981), aff'd, United States v. Mackin, 668 F.2d 122 (2d Cir. 1981); In re McMullen, No. 3-78-1899 M.G. (N.D. Cal., May 11, 1979).

51. See generally 2 Bassiouni & Nanda, International Criminal Law, supra note 12 for a review and analysis of the various forms of international cooperation in penal matters.

52. Examples of such aspects are provisions regarding transit extradition, priority of extradition requests, and the rule of specialty. See Senate Judiciary Hearings on S. 1639, supra, note 3, at 20-24 (testimony of M. Cherif Bassiouni); House Judiciary Hearings on H.R. 5227, supra note 4, at 98-106 (testimony of M. Cherif Bassiouni).

53. This argument was raised unsuccessfully by the U.S. government in Eain v. Wilkes, 641 F.2d 504 (7th Cir.), cert. denied, 454 U.S. 894 (1981).

54. See, e.g., Bassiouni, U.S. International Extradition, supra note 12; M.C. Bassiouni, International Extradition and World Public Order (1974) for a review and analysis of this developing trend in U.S. jurisprudence.

55. See generally Bassiouni, U.S. International Extradition, supra note 12.

56. S. 220, supra note 7, §§ 3191-3198; S. 1940, supra note 5, §§ 3191-3198; S. 1639, supra note 1, §§ 3191-3198.

57. H.R. 2643, supra note 8, §§ 3191-3199; H.R. 6046, supra note 5, §§ 3191-3199; H.R. 5227, supra note 2, §§ 3191-3198. H.R. 5227 contained no provision regarding transit extradition, which was inserted in subsequent versions of the House legislation as Section 3197.

58. H.R. 2643, supra note 8, § 3199(c); H.R. 6046, supra note 5, § 3199(c); H.R. 5227, supra note 2, § 3199(c). See infra notes 169-85 and accompanying text.

59. See generally L. Henkin, Foreign Affairs and the Constitution (1972).

60. See 18 U.S.C.A. § 3181 (1982 Supp.)

61. See 1 Bassiouni, U.S. International Extradition, supra note 12, at Chap. II § 3, pp. 6-9.

62. See, e.g., United States v. Rauscher, 119 U.S. 407 (1886), in which the Court stated:

It is only in modern times that the nations of the earth have imposed upon themselves the obligation of delivering up these fugitives from justice to the states where their crimes were committed, for trial and punishment. This has been done generally by treaties . . . Prior to these treaties, and apart from them . . . there was no well-defined obligation on one country to deliver up such fugitives to another, and though such delivery was often made, it was upon the principle of comity. . . . [It] has never been recognized as among those obligations of one government towards another which rest upon established principles of international law.

Id. at 411.

63. See 1 Bassiouni, U.S. International Extradition, supra note 12, at Chap. II, § 1, p. 3.



64. These observations were made by this writer before the Senate and House Judiciary Committee hearings on their respective proposed bills. See Senate Judiciary Hearings on S. 1639, supra note 3, at 20-23 (testimony of M. Cherif Bassiouni); House Judiciary Hearings on H.R. 5227, supra note 4, at 101-102 (testimony of M. Cherif Bassiouni).

65. For a bibliography of international criminal law conventions, see Bassiouni, International Criminal Code, supra note 12, at xix-xxx.

66. See 1 Bassiouni, U.S. International Extradition, supra note 12, at Chap. I, § 3; Bassiouni, "The Common Characteristics of Conventional International Criminal Law," supra note 12 (compilation and analysis of international criminal law conventions which contain provisions imposing the duty to prosecute or extradite). See also Bassiouni, "General Report on the Juridical Status of the Requesting State Denying Extradition," XIth International Congress of Comparative Law, Caracas, Venezuela 20 August-5 September 1982, Proceedings of XIth International Congress of Comparative Law (in print) (comparative analysis of state law and practice regarding duty to prosecute or extradite).

67. Senate Judiciary Report, supra note 14, at 4; House Judiciary Report, supra note 22, at 3-4.

68. The specific language of both bills is as follows:

§ 3191. Extradition in general

The United States may extradite a person to a foreign state pursuant to this chapter only if--

(a) there is a treaty concerning extradition between the United States and the foreign state; and

(b) the foreign state requests extradition within the terms of the applicable treaty.

S. 220, supra note 7, § 3191; S. 1940, supra note 5, § 3191;

S. 1639, supra note 1, § 3191.

§ 3191. General statement of requirements for extradition

The United States may extradite a person to a foreign state in accordance with this chapter only if--

(1) there is an applicable treaty concerning extradition between the United States and such foreign state;

(2) the foreign state requests extradition in accordance with the terms of that treaty; and

(3) the appropriate court issues an order under this chapter that such person is extraditable.

H.R. 2643, supra note 8, § 3191; H.R. 6046, supra note 5, § 3191; H.R. 5227, supra note 2, § 3191.

69. See Valentine v. U.S. ex rel. Neidecker, 299 U.S. 5 (1936); Argento v. Horn, 241 F.2d 258, 259 (6th Cir.), cert. denied, 355 U.S. 818 (1957); Ivancevic v. Artukovic, 211 F.2d 565, 566 (9th Cir.), cert. denied, 348 U.S. 818 (1954).

70. See 1 Moore, Extradition, supra note 42, at 33-35 (1891) (Arguelles case); 6 M. Whiteman, Digest of International Law 744-45 (1968) (Koveleskie case) [hereinafter referred as Whiteman, Digest].

71. See 1 Bassiouni, U.S. International Extradition, supra note 12, at Chap. II, § 3, pp. 6-9 (review of U.S. law and practice regarding reciprocity as a legal basis for extradition in the absence of a treaty).

72. S. 220, supra note 7, § 3198(a)(4); S. 1940, supra note 5, § 3198(a)(4); S. 1639, supra note 1, § 3198(a)(4). In its report on S. 1940, the Senate Judiciary Committee noted that this expansion should not be interpreted such that the chapter would also regulate alternative methods of rendition through Status of Forces Agreements and deportation proceedings. See Senate Judiciary Report on S. 1940, supra note 15, at 5-6. For a review and appraisal of these alternative methods, see I Bassiouni, U.S. International Extradition, supra note 12, Chap. II, § 3, pp. 9-13, Chap. IV, § 1.

73. H.R. 2643, supra note 8, § 3199(a)(2); H.R. 6046, supra note 5, § 3199(a)(2); H.R. 5227, supra note 2, § 3198(a)(2). The House Judiciary Report specifically noted that the term "treaty" is defined so as to exclude executive agreements. See House Judiciary Report on H.R. 6046, supra note 23, at 6. The Committee also stated that this provision should not be construed such that the "Act" would regulate rendition under Status of Forces Agreements or deportation proceedings. See id. at 8 n. 15.

74. See Senate Judiciary Report on S. 1940, supra note 15, at 5, wherein it is noted that Section 3191 "refers to a treaty 'concerning extradition' rather than an 'extradition treaty' because an obligation to extradite a particular class of offenders is sometimes included in international agreements other than extradition treaties." The Report then refers in a footnote to the same conventions listed infra in note 78.

75. See S. 1940 as reported by the Senate Foreign Relations Committee in its Report, supra note 20, at 16 et seq.; S. 220, supra note 4, § 3198(a)(4).

76. See H.R. 5227, supra note 2, § 3198(a)(2); H.R. 6046, supra note 5, § 3199(a)(2) as reported by the House Judiciary Committee in its report, supra note 23, at 6; H.R. 2643, supra note 8, § 3199(a)(2).

77. Senate Judiciary Report on S. 1940, supra note 15, at 5; House Judiciary Report on H.R. 6046, supra note 23, at 6.

78. E.g., Single Convention on Narcotic Drugs, 30 March 1961, 520 U.N.T.S. 151, 18 U.S.T. 1407, T.I.A.S. No. 6298; Protocol Amending the Single Convention on Narcotic Drugs, 25 March 1972, U.N. Doc. E/Conf. 63/9, 26 U.S.T. 1439, T.I.A.S. No. 8118; Convention on Psychotropic Substances, 21 February 1971, U.N. Doc. E/Conf. 58/6, \_\_\_\_ U.S.T. \_\_\_\_, T.I.A.S. No. 9725; OAS Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance, 2 February 1971, 27 U.S.T. 3949, T.I.A.S. No. 8413; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, 14 December 1973, G.A. Res. A/3166 (XXVIII), 28 U.N. GAOR Supp. (No. 30) 146, U.N. Doc. A/9030, 28 U.S.T. 1975, T.I.A.S. No. 8532; Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft, 14 September 1963, 704 U.N.T.S. 219, 20 U.S.T. 2941, T.I.A.S. No. 6768; Hague Convention on the Sup-

pression of Unlawful Seizure of Aircraft, 16 December 1970, 860 U.N.T.S. 105, 22 U.S.T. 1641, T.I.A.S. No. 7192; Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 25 September 1971, 24 U.S.T. 564, T.I.A.S. No. 7570. For a list of international instruments on international criminal law and a bibliography of international crimes, see Bassiouni, International Criminal Code, supra note 12, at xix-xxx.

79. See, e.g., id. at 19-22. See also 1 Bassiouni & Nanda, International Criminal Law, supra note 12, at 1-158.

80. This expansion of the legal basis of extradition to include multilateral international criminal law conventions containing an extradition clause was suggested by this writer before Senate and House hearings on proposed versions of the "Act." See Senate Judiciary Hearings on S. 1639, supra note 3, at 21; House Judiciary Hearings on H.R. 5227, supra note 4, at 98, 102. In written statements submitted to both Committees, specific reference was made to those treaties listed supra in note 78.

81. For a critical view of the practice, see Bassiouni, "International Procedures for the Apprehension and Rendition of Fugitive Offenders," 74 Proc. Am. Soc'y Int'l L. 273 (1980).

82. S. 220, S. 1940, and S. 1639 require that "the foreign state request extradition within the terms of the applicable treaty." S. 220, supra note 7, § 3191(b); S. 1940, supra note 5, § 3191(b); S. 1639, supra note 1, § 3191(b).



H.R. 2643, H.R. 6046, and H.R. 5227 require that "[t]he foreign state request extradition in accordance with the terms of [the applicable] treaty. . . ." H.R. 2643, supra note 8, § 3191(2); H.R. 6046, supra note 5, § 3191(2); H.R. 5227, supra note 2, § 3191(2). The House Judiciary Committee stated in its report that the language "in accordance with the terms of" was chosen instead of "within the terms of" in order to "achieve greater clarity" but was intended to have the same meaning as that of the Senate bill. See House Judiciary Report on H.R. 6046, supra note 23, at 6.

83. S. 220, supra note 7, § 3191(a), (b); S. 1940, supra note 5, § 3191(a), (b); S. 1639, supra note 1, § 3191(a)(b). The House version states that "the appropriate court [must] issue an order under this chapter that such person is extraditable." H.R. 2643, supra note 8, § 3191(3); H.R. 6046, supra note 5, § 3191(3); H.R. 5227, supra note 2, § 3191(3).

84. Senate Judiciary Report on S. 1940, supra note 15, at 5. The provisions of S. 220, S. 1940, and S. 1639 are identical regarding this point. See S. 1639, supra note 1, § 3191(a), (b), S. 1940, supra note 5, § 3191(a), (b); S. 220, supra note 7, § 3191(a), (b).

85. S. 220, supra note 7, § 3191(b); S. 1940, supra note 5, § 3191(b); S. 1639, supra note 1, § 3191(b); H.R. 2643, supra note 8, § 3191(2); H.R. 6046, supra note 5, § 3191(2); H.R. 5227, supra note 2, § 3191(2). This includes the substantive requirements discussed below and the documentation and evidence needed to be presented as well as the certifica-

tion of all necessary documents. See S. 220, supra note 7, § 3194(c); S. 1940, supra note 5, § 3194(c); S. 1639, supra note 1, § 3194(c); H.R. 2643, supra note 8, § 3194(g); H.R. 6046, supra note 5, § 3194(g); H.R. 5227, supra note 2, § 3194(g), discussed at notes 249-68 and accompanying text infra.

86. See Senate Judiciary Report on S. 1940, supra note 15, at 5; House Judiciary Report on H.R. 6046, supra note 23, at 6.

87. The provisions states:

If the Attorney General has previously sought an order that a person is extraditable under this chapter with respect to a specific extradition request of a foreign state the Attorney General may not file another complaint under this section based upon the same factual allegations as a previous complaint, unless the Attorney General shows good cause for filing another complaint.

H.R. 2643, supra note 8, § 3192(a)(2); H.R. 6046, supra note 5, § 3192(a)(2); H.R. 5227, supra note 2, § 3192(a)(2).

88. See S. 220, supra note 7; S. 1940, supra note 5; S. 1639, supra note 1.

89. See, e.g., Galanis v. Pallanck, 568 F.2d 234 (2d Cir. 1977); Sindona v. Grant, 619 F.2d 167 (2d Cir. 1980).

90. 6 Whiteman, Digest, supra note 70, at 1054.

91. Treaty on Extradition Between the United States and Italy, 18 January 1973, 26 U.S.T. 493, T.I.A.S. No. 8052, (Article VI(1)). See also Convention on Extradition Between the United States and Sweden, 24 October 1961, 14 U.S.T. 1845, T.I.A.S. No. 5496 (Article V(1)); Convention Relating to Extradition Between the United States and Israel, 10 December

1962, 14 U.S.T. 1707, T.I.A.S. No. 5476 (Article VI(1)); Treaty on Extradition Between the United States and New Zealand, 12 January 1970, 22 U.S.T. 1, T.I.A.S. No. 7035 (Article VI(1)); Treaty on Extradition Between the United States and Spain, 29 May 1970, 22 U.S.T. 737, T.I.A.S. No. 7136 (Article V(1)); Treaty on Extradition Between the United States and Argentina, 21 January 1972, 23 U.S.T. 3501, T.I.A.S. No. 7510 (Article 7(a)); Treaty on Extradition Between the United States and Paraguay, 24 May 1973, 25 U.S.T. 967, T.I.A.S. No. 7838 (Article 5(1)); Treaty on Extradition Between the United States and Denmark, 22 June 1972, 25 U.S.T. 1293, T.I.A.S. No. 7864 (Article 7(1)); Treaty on Extradition Between the United States and Australia, 14 May 1974, 27 U.S.T. 957, T.I.A.S. No. 8234 (Article VII(1)).

92. For an analysis of the concept of "same or substantially the same offense," see M.C. Bassiouni, International Extradition and World Public Order 452-59 (1974), relied upon on this issue in *Sindona v. Grant*, 619 F.2d 167, 177-78 (2d Cir. 1980). See also 2 Bassiouni, U.S. International Extradition, supra note 12, at Chap. VIII, § 4, pp. 4-12.

93. See House Judiciary Report on H.R. 6046, supra note 23, at 8. The provision regarding renewed requests is the same in H.R. 5227, H.R. 6046, and H.R. 2643. See H.R. 5227, supra note 2, § 3192(a)(2); H.R. 6046, supra note 5, § 3192(a)(2); H.R. 2643, supra note 8, § 3192(a)(2).

94. See H.R. 2643, supra note 8, § 3192(a)(3); H.R. 6046, supra note 5, § 3192(a)(3). A section regarding multi-

ple requests was not included in the original House bill, H.R. 5227, but was inserted in the bill's "mark up" and thus included in H.R. 6046.

95. See S. 220, supra note 7; S. 1940, supra note 5; S. 1639, supra note 1.

96. H.R. 2643, supra note 8, § 3192(a)(3); H.R. 6046, supra note 5, § 3192(a)(3).

97. See 1 Bassiouni, U.S. International Extradition, supra note 12, at Chap. VI; Feller, "Jurisdiction over Offenses with a Foreign Element," in 2 Bassiouni & Nanda, International Criminal Law, supra note 12, at 5 et seq.; Restatement of Foreign Relations Law of the United States (Revised) (Tentative Draft No. 2), §§ 401-404, 441-443 (1981); Restatement of the Foreign Relations Law of the United States (Revised) (Tentative Draft No. 3), §§ 401, 419-420, 431-433 (1982). See also Henkin, "Restatement of the Foreign Relations Law of the United States (Revised): Tentative Draft No. 2," 75 Am. J. Int'l L. 987 (1981); Henkin, "Restatement of the Foreign Relations Law of the United States (Revised): Tentative Draft No. 3," 76 Am. J. Int'l L. 653 (1982).

98. The active personality (nationality) theory of jurisdiction confers jurisdiction to prosecute upon the alleged offender's state of nationality. See 1 Bassiouni, U.S. International Extradition, supra note 12, at Chap. VI, § 3.

99. The territorial theory confers jurisdiction to prosecute upon the state in which the alleged offense occurred. See 1 id. at Chap. VI, § 2.

100. The passive personality theory confers jurisdiction to prosecute upon the state of nationality of the victim of the alleged offense. See 1 id. at Chap. VI, § 4.

101. See 1 id. at Chap. IV.

102. E.T.S. No. 24, Article 2 (1957).

103. The Senate version states that "[t]he Attorney General may file a complaint charging that a person is extraditable." S. 220, supra note 7, § 3192(a); S. 1940, supra note 5, § 3192(a); S. 1639, supra note 1, § 3192(a). The House version provides that "[t]he United States District Court for the district in which the person sought to be extradited is found may issue an order in accordance with this chapter that such person is extraditable, upon a complaint filed by the Attorney General." H.R. 2643, supra note 8, § 3192(a)(1); H.R. 6046, supra note 5, § 3192(a)(1); H.R. 5227, supra note 2, § 3192(a)(1).

104. Present federal law does not specify who can file a complaint on behalf of the requesting state. This has forced the courts to determine who is "authorized" to represent the requesting state on a case-by-case basis. See, e.g., U.S. ex rel. Capputo v. Kelley, 92 F.2d 603 (2d Cir. 1937), cert. denied, 303 U.S. 635 (1938) (consular representatives).

105. See 2 Bassiouni, U.S. International Extradition, supra note 17, at Chap. IX, § 1, p. 3.



106. The Senate and House Judiciary Committee Reports also noted that in recent years it has become common practice for the Attorney General to represent the requesting state, either because this is called for in the applicable extradition treaty or because it is required in treaties regarding mutual assistance in legal matters. See Senate Judiciary Report on S. 1940, supra note 15, at 6; House Judiciary Report on H.R. 6046, supra note 23, at 7.

107. The Senate bill provides that

[t]he Attorney General shall file the complaint in the United States district court--

(1) for the district in which the person may be found; or

(2) for the District of Columbia, if the Attorney General does not know where the person may be found.

S. 220, supra note 7, § 3192(a)(1), § 3192(a)(2); S. 1940, supra note 5, § 3192(a)(1), § 3192(a)(2); S. 1639, supra note 1, § 3192(a)(1), § 3192(a)(2).

The House bill states that

[t]he United States district court for the district in which the person sought to be extradited is found may issue an order in accordance with this chapter that such person is extraditable. . . .

The Attorney General may file a complaint under this chapter in the United States District Court for the District of Columbia if the Attorney General does not know where the person sought may be found.

H.R. 2643, supra note 8, § 3192(a)(1), § 3192(c); H.R. 6046, supra note 5, § 3192(a)(1), § 3192(c); H.R. 5227, supra note 2, § 3192(c).

S. 220, S. 1940, and S. 1639 define "court" as

(A) a United States district court established pursuant to section 132 of title 28, United States Code, the District Court of Guam, the District Court of the Virgin Islands, or the District Court of the Northern Mariana Islands; or

(B) a United States magistrate authorized to conduct an extradition proceeding. . . .

S. 220, supra note 7, §§ 3198(a)(1)(A), 2198(a)(1)(B); S. 1940, supra note 5, §§ 3198(a)(1)(A), 3198(a)(1)(B); S. 1639, supra note 1, §§ 3198(a)(1)(A), 3198(a)(1)(B).

H.R. 6046, H.R. 2643, and H.R. 5227 provide that

the term "united States district court" includes the District Court of Guam, the District Court of the Virgin Islands, and the District Court of the Northern Mariana Islands, and Guam, the Virgin Islands, and the Northern Mariana Islands are, respectively, the districts for such district courts.

H.R. 2643, supra note 8, § 3199(a)(4); H.R. 6046, supra note 5, § 3199(a)(4); H.R. 5227, supra note 2, § 3198(a)(4).

108. Under existing legislation, state judges are authorized to hear extradition cases. See 18 U.S.C. § 3184 (1976).

109. See supra note 107.

110. H.R. 2643, supra note 8, § 3192(c); H.R. 6046, supra note 5, § 3192(c); H.R. 5227, supra note 2, § 3192(c).

111. H.R. 2643, supra note 8, § 3192(d); H.R. 6046, supra note 5, § 3192(d); H.R. 5227, supra note 2, § 3192(d).

112. S. 220, supra note 7, § 3192(c); S. 1940, supra note 5, § 3192(c); S. 1639, supra note 1, § 3192(c).

113. With respect to this subsection, which is the same in S. 220, S. 1940, and S. 1639, the Senate Judiciary Commit-

tee preferred to give an explanation of the term "found," by stating:

The word "found" is intended to have its usual, non-technical meaning and permits extradition proceedings to be initiated in any district in which the fugitive can be physically apprehended, without regard to the manner in which the fugitive entered the district.

Senate Judiciary Report on S. 1940, supra note 14, at 7.

114. This view is supported by a statement in the House Judiciary Report regarding the House bills' provision on arrest, which requires that the relator be brought before the "nearest available United States district court." H.R. 2643, supra note 8, § 3192(d)(1); H.R. 6046, supra note 5, § 3192(d)(1); H.R. 5227, supra note 2, § 3192(d)(1). The House Judiciary Report notes that this provision:

permits the government to take the detained person before a district court in a district other than the one in which the person is found if a court in another location is closer. This authority is granted for the convenience of the government and the person sought. It should not be read as authority for the government to choose the court in which to proceed based on factors other than convenience.

House Judiciary Report on H.R. 6046, supra note 23, at 10.

The Senate Judiciary Report, similarly, notes with regard to the requirement that the relator be brought before the "nearest available court," S. 220, supra note 7, § 3192(c), S. 1940, supra note 5, § 3192(c), S. 1639, supra note 1, § 3192(c), that "[t]here is no requirement that the extradition hearing take place in the State in which the fugitive is

found. . . ." Senate Judiciary Report on S. 1940, supra note 15, at 8.

115. Both congressional versions of the "Act" require that the relator be brought before the district court "without unnecessary delay." See S. 220, supra note 7, § 3192(c); S. 1940, supra note 5, § 3192(c); S. 1639, supra note 1, § 3192(c); H.R. 2643, supra note 8, § 3192(d)(1); H.R. 6046, supra note 5, § 3192(d)(1); H.R. 5227, supra note 2, § 3192(d). This aspect of the extradition hearing is given more detailed consideration at notes 145-48 and accompanying text infra.

116. The House Judiciary Committee specifically stated, however, that the provision should not be used by the Government to engage in forum shopping. See House Judiciary Report on H.R. 6046, supra note 23, at 10, quoted at note 114 supra.

117. H.R. 2643, supra note 8, § 3199(f); H.R. 6046, supra note 5, § 3199(f); H.R. 5227, supra note 2, § 3198(f). See note 423 and accompanying text infra.

118. See Fed. R. Civ. P. 23.1 (secondary action by shareholders); id. 27(a) (depositions to perpetuate testimony); id. 65 (injunctions); id. 66 (receivers). See generally 2A J. Moore, W. Taggart & J. Wicker, Moore's Federal Practice ¶ 11.03 (3d ed. 1982) [hereinafter referred to as Moore's Federal Practice].

119. See Fed. R. Crim. P. 7 (information as basis for prosecution); id. 3 (complaint as basis for arrest). See

generally 8 Moore's Federal Practice, supra note 118, at Chaps. 3, 7.

120. See The Head Money Cases, 112 U.S. 580, 598-99 (1884); Grin v. Shine, 187 U.S. 181, 191 (1902); Charlton v. Kelly, 229 U.S. 447, 465 (1912).

121. See S. 220, supra note 7, § 3192(b); S. 1940, supra note 5, § 3192(b); S. 1639, supra note 1, § 3192(b); H.R. 2643, supra note 8, § 3192(b); H.R. 6046, supra note 5, § 3192(b); H.R. 5227, supra note 2, § 3192(b).

122. See Senate Judiciary Report on S. 1940, supra note 15, at 7-8; House Judiciary Report on H.R. 6046, supra note 23, at 9-10.

123. S. 220, supra note 7, § 3192(b) (1); S. 1940, supra note 5, § 3192(b) (1); S. 1639, supra note 1, § 3192(b) (1); H.R. 2643, supra note 8, § 3192(b) (2), (b) (4) (A); H.R. 6046, supra note 5, § 3192(b) (2), (b) (4) (A); H.R. 5227, supra note 2, § 3192(b) (2), (b) (4) (A). The House bill further provides that the complaint shall also "contain any matter not otherwise required by this chapter but required by the applicable treaty concerning extradition." H.R. 2643, supra 8, § 3192(b) (3); H.R. 6046, supra note 5, § 3192(b) (3); H.R. 5227, supra note 2, § 3192(b) (3).

124. H.R. 2643, supra note 8, § 3192(b) (4) (B); H.R. 6046, supra note 5, § 3192(b) (4) (B); H.R. 5227, supra note 2, § 3192(b) (4) (B).

125. Section 3192(b) (2) of the Senate bill states that a complaint for a provisional arrest



shall contain--

(i) information sufficient to identify the person sought;

(ii) a statement of the essential facts constituting the offense that the person is believed to have committed, or a statement that an arrest warrant for the person is outstanding in the foreign state; and

(iii) a description of the circumstances that justify the person's arrest; or

(B) shall contain such other information as is required by the applicable treaty; and shall be supplemented before the extradition hearing by the materials specified in paragraph (1).

S. 220, supra note 7, § 3192(b)(2); S. 1940, supra note 5, § 3192(b)(2); S. 1639, supra note 1, § 3192(b)(2).

126. S. 220, supra note 7, § 3192(b)(2); S. 1940, supra note 5, § 3192(b)(2); S. 1639, supra note 1, § 3192(b)(2).

The Senate versions also differ from those of the House in that the Senate bills do not provide that the appropriate documents from the requesting state may prove the relator's conviction, rather than his indictment or other form of accusation, of the offenses for which his extradition is requested. It is assumed that this is a mere technical oversight of drafting which does not imply that an extradition request cannot be based upon the relator's conviction of the offenses in question in the requesting state.

127. See supra note 118.

128. See supra note 119.

129. See Senate Judiciary Report on S. 1940, supra note 15, at 7-8; House Judiciary Report on H.R. 6046, supra note

23, at 9-10. See generally 2 Bassiouni, U.S. International Extradition, supra note 12, at Chap. IX, § 2, pp. 4-5.

130. See S. 220, supra note 7, § 3194(d); S. 1940, supra note 5, § 3194(d); S. 1639, supra note 1, § 3194(d); H.R. 2643, supra note 8, § 3194(d)(1); H.R. 6046, supra note 5, § 3194(d)(1); H.R. 5227, supra note 2, § 3194(d)(1).

131. See Fed. R. Civ. P. 41(b) (dismissal of complaint with prejudice); Fed. R. Crim. P. 7(c), 12 (dismissal of indictment or information for error or omission which misled defendant to his prejudice). Neither the Senate nor the House Judiciary Report addresses this issue.

132. See supra notes 118, 131.

133. See supra notes 119, 131.

134. See H.R. 2643, supra note 8, § 3192(a)(2), H.R. 6046, supra note 5, § 3192(a)(2), H.R. 5227, supra note 2, § 31982(d)(2), discussed at notes 88-93 and accompanying text supra.

135. See generally 2 Bassiouni, U.S. Int'l Extradition, supra note 12, at Chap. IX, § 2.

136. S. 220, S. 1940, and S. 1639 contain the following provision on these aspects:

(c) ARREST OR SUMMONS.--Upon receipt of a complaint, the court shall issue a warrant for the arrest of the person sought, or, if the Attorney General so requests, a summons to the person to appear at an extradition hearing. The warrant or summons shall be executed in the manner prescribed by rule 4(d) of the Federal Rules of Criminal Procedure. A person arrested pursuant to this section shall be taken without unnecessary delay

before the nearest available court for an extradition hearing.

S. 220, supra note 7, § 3192(c); S. 1940, supra note 5, § 3192(c); S. 1639, supra note 1, § 3192(c).

The comparable sections of H.R. 2643, H.R. 6046, and H.R. 5227 state the following:

Upon the filing of a complaint under this section, the court shall issue a warrant for the arrest of the person sought, or, if the Attorney General so requests, a summons to such person to appear at an extradition hearing under this chapter. The warrant or summons shall be executed and returned in the manner prescribed for the execution and return of a warrant or summons, as the case may be, under the Federal Rules of Criminal Procedure. A person arrested under this section shall be taken without unnecessary delay before the nearest available United States district court for further proceedings under this chapter.

H.R. 2643, supra note 8, § 3192(d) (1); H.R. 6046, supra note 5, § 3192(d) (1); H.R. 5227, supra note 2, § 3192(d).

137. Current legislation provides only for the issuance of an arrest warrant. See 18 U.S.C. § 3184 (1976).

138. Such discretion can be inferred from the language of both versions of the "Act," which provide for the issuance of a summons "if the Attorney General so requests." S. 220, supra note 7, § 3192(c); S. 1940, supra note 5, § 3192(c); S. 1639, supra note 1, § 3192(c); H.R. 2643, supra note 8, § 3192(d) (1); H.R. 6046, supra note 5, § 3192(d) (1); H.R. 5227, supra note 2, § 3192(d).

139. 18 U.S.C. § 3184 (1976). See 2 Bassiouni, U.S. International Extradition, supra note 12, at Chap. IX, § 2,

pp. 28-37. See also, e.g., Extradition Treaty, U.S.-Canada, entered into force, 27 March, 1976, 27 U.S.T. 983, T.I.A.S. No. 8237, Article 11. Both the Senate and House Judiciary Reports noted that the provision is a codification of existing practice. See Senate Judiciary Report on S. 1940, supra note 15, at 7-8; House Judiciary Report on H.R. 6046, supra note 23, at 9-10.

140. See supra note 136.

141. See S. 220, supra note 7, § 3192(d)(2); S. 1940, supra note 5, § 3192(d)(2); S. 1639, supra note 1, § 3192(d)(2); H.R. 2643, supra note 8, § 3192(c); H.R. 6046, supra note 5, § 3192(c); H.R. 5227, supra note 2, § 3192(c).

142. See Caltagirone v. Grant, 629 F.2d 739 (2d Cir. 1980).

143. Rule 4 states:

ARREST WARRANT OR SUMMONS UPON COMPLAINT

(a) Issuance. If it appears from the complaint, or from an affidavit or affidavits filed with the complaint, that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any office authorized by law to execute it. Upon the request of the attorney for the government a summons instead of a warrant shall issue. More than one warrant or summons may issue on the same complaint. If a defendant fails to appear in response to the summons, a warrant shall issue.

(b) Probable cause. The finding of probable cause may be based upon hearsay evidence in whole or in part.

(c) Form.

(1) Warrant. The warrant shall be signed by the magistrate and shall contain

the name of the defendant or, if his name is unknown, any name or description by which he can be identified with reasonable certainty. It shall describe the offense charged in the complaint. It shall command that the defendant be arrested and brought before the nearest available magistrate.

(2) Summons. The summons shall be in the same form as the warrant except that it shall summon the defendant to appear before a magistrate at a stated time and place.

(d) Execution or service; and return.

(1) By whom. The warrant shall be executed by a marshal or by some other officer authorized by law. The summons may be served by any person authorized to serve a summons in a civil action.

(2) Territorial limits. The warrant may be executed or the summons may be served at any place within the jurisdiction of the United States.

(3) Manner. The warrant shall be executed by the arrest of the defendant. The officer need not have the warrant in his possession at the time of the arrest, but upon request he shall show the warrant to the defendant as soon as possible. If the officer does not have the warrant in his possession at the time of the arrest, he shall then inform the defendant of the offense charged and of the fact that a warrant has been issued. The summons shall be served upon a defendant by delivering a copy to him personally, or by leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein and by mailing a copy of the summons to the defendant's last known address.

(4) Return. The officer executing a warrant shall make return thereof to the magistrate or other officer before whom the defendant is brought pursuant to Rule 5. At the request of the attorney for the government any unexecuted warrant shall be returned to the magistrate by whom it was issued and shall be cancelled by him. On or before the return day the person to whom a summons was delivered for service shall make return thereof to the magis-



trate before whom the summons is returnable. At the request of the attorney for the government made at any time while the complaint is pending, a warrant returned unexecuted and not cancelled or a summons returned unserved or a duplicate thereof may be delivered by the magistrate to the marshal or other authorized person for execution or service.

Fed. R. Crim. Pro. 4.

144. The House Judiciary Committee justified this lack of specificity on the grounds that future amendments to the Rules might change the numerical designation of the rule regarding arrests. The Committee noted, however, that Rule 4(d) is currently applicable to this subsection. See House Judiciary Report on H.R. 6046, supra note 23, at 10.

145. S. 220, supra note 7, § 3192(c); S. 1940, supra note 5, § 3192(c); S. 1639, supra note 1, § 3192(c); H.R. 2643, supra note 8, § 3192(d) (1); H.R. 6046, supra note 5, § 3192(d) (1); H.R. 5227, supra note 2, § 3192(d).

146. See supra note 113 and accompanying text.

147. Rule 5 states:

INITIAL APPEARANCE BEFORE THE MAGISTRATE

(a) In General. An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available federal magistrate or, in the event that a federal magistrate is not reasonably available, before a state or local judicial officer authorized by 18 U.S.C. § 3041. If a person arrested without a warrant is brought before a magistrate, a complaint shall be filed forthwith which shall comply with the requirements of Rule 4(a) with respect to the showing of probable cause. When a person, arrested with or without a warrant or given a summons, appears initially

before the magistrate, the magistrate shall proceed in accordance with the applicable subdivisions of this rule.

(b) Minor Offenses. If the charge against the defendant is a minor offense triable by a United States magistrate under 18 U.S.C. § 3401, the United States magistrate shall proceed in accordance with the Rules of Procedure for the Trial of Minor Offenses Before United States Magistrates.

(c) Offenses Not Triable by the United States Magistrate. If the charge against the defendant is not triable by the United States magistrate, the defendant shall not be called upon to plead. The magistrate shall inform the defendant of the complaint against him and of any affidavit filed therewith, of his right to retain counsel, of his right to request the assignment of counsel if he is unable to obtain counsel, and of the general circumstances under which he may secure pretrial release. He shall inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The magistrate shall also inform the defendant of his right to a preliminary examination. He shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided by statute or in these rules.

A defendant is entitled to a preliminary examination, unless waived, when charged with any offense, other than a petty offense, which is to be tried by a judge of the district court. If the defendant waives preliminary examination, the magistrate shall forthwith hold him to answer in the district court. If the defendant does not waive the preliminary examination, the magistrate shall schedule a preliminary examination. Such examination shall be held within a reasonable time but in any event not later than 10 days following the initial appearance if the defendant is in custody and no later than 20 days if he is not in custody, provided, however, that the preliminary examination shall not be held if the defendant is indicted or if an information

against the defendant is filed in district court before the date set for the preliminary examination. With the consent of the defendant and upon a showing of good cause, taking into account the public interest in the prompt disposition of criminal cases, time limits specified in this subdivision may be extended one or more times by a federal magistrate. In the absence of such consent by the defendant, time limits may be extended by a judge of the United States only upon a showing that extraordinary circumstances exist and that delay is indispensable to the interests of justice.

Fed. R. Crim. Pro. 5. In addition, Rule 5.1 provides:

#### PRELIMINARY EXAMINATION

(a) Probable Cause of Finding. If from the evidence it appears that there is probable cause to believe that an offense has been committed and that the defendant committed it, the federal magistrate shall forthwith hold him to answer in district court. The finding of probable cause may be based upon hearsay evidence in whole or in part. The defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. Objections to evidence on the ground that it was acquired by unlawful means are not properly made at the preliminary examination. Motions to suppress must be made to the trial court as provided in Rule 12.

(b) Discharge of Defendant. If from the evidence it appears that there is no probable cause to believe that an offense has been committed or that the defendant committed it, the federal magistrate shall dismiss the complaint and discharge the defendant. The discharge of the defendant shall not preclude the government from instituting a subsequent prosecution for the same offense.

(c) Records. After concluding the proceeding the federal magistrate shall transmit forthwith to the clerk of the district court all papers in the proceeding. The magistrate shall promptly

make or cause to be made a record or summary of such proceeding.

(1) On timely application to a federal magistrate, the attorney for a defendant in a criminal case may be given the opportunity to have the recording of the hearing on preliminary examination made available for his information in connection with any further hearing or in connection with his preparation for trial. The court may, by local rule, appoint the place for an define the conditions under which such opportunity may be afforded counsel.

(2) On application of a defendant addressed to the court or any judge thereof, an order may issue that the federal magistrate make available a copy of the transcript, or of a portion thereof, to defense counsel. Such order shall provide for prepayment of costs of such transcript by the defendant unless the defendant makes a sufficient affidavit that he is unable to pay or to give security therefor, in which case the expense shall be paid by the Director of the Administrative Office of the United States Courts from available appropriated funds. Counsel for the government may move also that a copy of the transcript, in whole or in part, be made available to it, for good cause shown, and an order may be entered granting such motion in whole or in part, on appropriate terms, except that the government need not prepay costs nor furnish security therefor.

Fed. R. Crim. Pro. 5.1. The analogy to Rule 5 was specifically recognized by the Senate and House Judiciary Committees. See Senate Judiciary Report on S. 1940, supra note 15, at 8; House Judiciary Report on H.R. 6046, supra note 23, at 16.

148. See McNabb v. United States, 318 U.S. 332 (1943); Mallory v. United States, 354 U.S. 449 (1954); Fed. R. Crim. P. 5. Title II of the Omnibus Crime Control Act and Safe Streets Act of 1968, 18 U.S.C. § 3501 (1976), purports to repeal the McNabb-Mallory rule; in light of Miranda v.

Arizona, 384 U.S. 436 (1966), however, the constitutional effect of this repeal is questionable.

The Senate Judiciary Report noted that this subsection "is not intended to require the dismissal of the extradition proceedings solely on the ground that the fugitive arrested for extradition was taken without unnecessary delay before a judge or magistrate later determined not to be the 'nearest' one." Senate Judiciary Report on S. 1940, supra note 15, at 8.

149. Probable cause for arrest in an extradition proceeding is required according to the statement in *Collins v. Loisel*, 259 U.S. 309 (1925), that the magistrate is to determine whether or not there is "competent legal evidence which, according to the law of [the state wherein the relator is found], would justify his apprehension and commitment for trial if the crime had been committed in that state." *Id.* at 315 (emphasis added).

150. *Caltagirone v. Grant*, 629 F.2d 739, 742 (2d Cir. 1980). See *Valencia v. Limbs*, 655 F.2d 195, 196 (9th Cir. 1981); *Hu Yau-Leung v. Soscia*, 649 F.2d 914, 915 (2d Cir. 1981); *Antines v. Vance*, 640 F.2d 3, 4 (4th Cir. 1981); *Greci v. Birkeness*, 527 F.2d 956 (1st Cir. 1976).

151. S. 220, supra note 7, § 3192(b)(1); S. 1940, supra note 5, § 3192(b)(1); S. 1639, supra note 1, § 3192(b)(1); H.R. 2643, supra note 8, § 3192(b)(2), (b)(4)(B); H.R. 6046, supra note 5, § 3192(b)(2), (b)(4)(A); H.R. 5227, supra note 2, § 3192(b)(2), (b)(4)(A).



152. *United States v. Johnson*, 323 U.S. 273, 276 (1944);  
*Blanchette v. Connecticut General Ins. Corp.*, 419 U.S. 102,  
 134 (1974).

153. In full, U.S. Const., Amend. IV provides:

The right of the people to be secure  
 in their persons, houses, papers, and  
 effects, against unreasonable searches and  
 seizures, shall not be violated, and no  
 Warrants shall issue, but upon probable  
 cause, supported by Oath or affirmation,  
 and particularly describing the place to  
 be searched, and the persons or things to  
 be seized.

154. See 28 U.S.C. § 1782(a) (1976) ("A person may not  
 be compelled to give his testimony or statement or to produce  
 a document or other thing in violation of any legally applica-  
 ble privilege.").

155. *Gerstein v. Pugh*, 420 U.S. 103, 111-12 (1975),  
quoting from, *Beck v. Ohio*, 379 U.S. 89, 91 (1964).

156. *Spinelli v. United States*, 393 U.S. 410, 418  
 (1969).

157. Id. at 413 n. 3; *Aguilar v. Texas*, 378 U.S. 108,  
 109 n. 1 (1964). Of course, the probable cause standard for  
 arrest warrants is the same as for search warrants. *Aguilar*  
*v. Texas*, 378 U.S. at 112 n. 3.

158. Other questions raised by the incorporation of  
 Fourth Amendment probable cause in extradition arrest pro-  
 cedures are considered in relation to the showing of probable  
 cause to extradite. See notes 269-92 and accompanying text  
infra.

159. *United States v. Toscanino*, 500 F.2d 267, 280 (2d Cir. 1974) (alien may challenge legality of wiretap on fourth amendment grounds); *Au Yi Lau v. Immigration and Naturalization Service*, 445 F.2d 217, 223 (D.C. Cir. 1971) (in deportation proceeding, alien may challenge legality of arrest on fourth amendment grounds).

160. See S. 220, supra note 7, § 3196(a); S. 1940, supra note 5, § 3196(a); S. 1639, supra note 1, § 3196(a); H.R. 2643, supra note 8, § 3196(a); H.R. 6046, supra note 5, § 3196(a); H.R. 5227, supra note 7, § 3196(a).

161. *Gerstein v. Pugh*, 420 U.S. 103, 113 (1975); *United States v. Watson*, 423 U.S. 411, 423-24 (1976). Of course, warrants to enter the relator's home, or the home of another, are still necessary. See generally *Payton v. New York*, 445 U.S. 573 (1980); *Steagald v. United States*, 451 U.S. 204 (1981).

162. In *Caltagirone v. Grant*, 629 F.2d 739 (2d Cir. 1980), to mention just one example, the court noted that the relator had been held, without probable cause that he had committed any crime, 97 days from his arrest until the Second Circuit acted. Id. at 749.

163. See *Sindona v. Grant*, 619 F.2d 167 (2d Cir. 1980).

164. See *Caltagirone v. Grant*, 629 F.2d 739 (2d Cir. 1980).

165. *Caltagirone v. Grant*, 629 F.2d 739, 742 (2d Cir. 1980). See *Valencia v. Limbs*, 655 F.2d 195, 196 (9th Cir. 1981); *Hu Yau-Leung v. Soscia*, 649 F.2d 914, 915 (2d Cir.

1981); *Antines v. Vance*, 640 F.2d 3, 4 (4th Cir. 1981); *Greci v. Birkeness*, 527 F.2d 956 (1st Cir. 1976). Probable cause for arrest is required according to the statement in *Collins v. Loisel*, 259 U.S. 309 (1925), that the magistrate is to determine whether or not there is "competent legal evidence which, according to the law of [the state wherein the relator is found], would justify his apprehension and commitment for trial if the crime had been committed in that state." *Id.* at 315 (emphasis added).

166. See *Caltagirone v. Grant*, 629 F.2d 739 (2d Cir. 1980).

167. See S. 220, supra note 7, § 3192(d)(2); S. 1940, supra note 5, § 3192(d)(2); S. 1639, supra note 1, § 3192(d)(2); H.R. 2643, supra note 8, § 3192(e); H.R. 6046, supra note 5, § 3192(e); H.R. 5227, supra note 2, § 3192(e).

168. Such a provision would allow an individual to be held upon merely a telex from the requesting state containing the unsupported assertion that the individual has been charged, prosecuted, or sentenced for a criminal offense. In light of *Caltagirone*, 629 F.2d 739 (2d Cir. 1980), this provision would likely be unconstitutional. This writer made similar observations before the Senate and House Judiciary Committees on their respective proposed bills. See Senate Judiciary Hearings on S. 1639, supra note 3, at 22; House Judiciary Hearings on H.R. 5227, supra note 4, at 98, 103.

169. See *Wright v. Henkel*, 190 U.S. 40 (1903). See also *Heu Yau-Leung v. Soscia*, 649 F.2d 914 (2d Cir. 1981) (youth-

fulness of relator and lack of appropriate detention facility sufficiently "special"); *United States v. Williams*, 611 F.2d 914 (1st Cir. 1979) (per curiam) (that relator's brother was released on bail pending extradition on same crime not sufficiently "special"); *Beaulieu v. Hartigan*, 554 F.2d 1 (1st Cir. 1977) (per curiam) (no "special" circumstances shown); In re Klein, 46 F.2d 85 (S.D.N.Y. 1930) (discomfort of confinement not a "special circumstance").

170. 18 U.S.C. §§ 3041, 3141-3143, 3146-3152, 3568 (1976).

171. See House Judiciary Report on H.R. 6046, supra note 23, at 10-11 (1982); House Foreign Affairs Report on H.R. 6046, supra note 27, at 2-3 (Dep'ts of State and Justice proposed amendments to H.R. 6046 to reinsert "special circumstances" requirement for bail rather than criteria enumerated in bill); id. at 3-5 (Cong. Hughes' response in support of enumerated criteria).

172. H.R. 2643, supra note 8, § 3192(d)(2); H.R. 6046, supra note 5, § 3192(d)(2); H.R. 5227, supra note 2, § 3192(d)(2). Upon a showing of "good cause" by the government, the proposed legislation permits the extension of this ten-day period for successive five-day periods. H.R. 2643, supra note 8, § 3192(d)(3); H.R. 6046, supra note 5, § 3192(d)(3); H.R. 5227, supra note 2, § 3192(d)(2). Thus, during provisional arrest for the first ten days the burden of proof is on the relator by a preponderance of the evidence. For the subsequent extensions of five days each, it is on the

government by a showing of good cause. For release after an arrest warrant has been served, the burden of proof is on the relator by a preponderance of the evidence. For release on appeal, it is the same.

173. H.R. 2643, supra note 8, § 3192(d)(2); H.R. 6046, supra note 5, § 3192(d)(2); H.R. 5227, supra note 1, § 3198(c)(2).

174. The House bills provide for the following criteria and conditions:

(c)(1) A person arrested or otherwise held or detained under this chapter shall to the extent practicable, be confined in a place other than one used for the confinement of persons convicted of crime. A person arrested or otherwise held or detained in connection with any proceeding under this chapter shall be treated in accordance with this subsection and chapter 207 of this title, except sections 3141, 3144, 3146(a), 3146(b), 3148, and 3150. Proceedings under this chapter shall be deemed criminal proceedings for the purposes of this application of chapter 207 of this title and the release of a person under this subsection shall be deemed to a release under section 3146(a) for the purposes of such application.

(2) Any person arrested or otherwise held or detained in connection with any proceeding under this chapter shall, at such person's appearance before a judicial officer, be ordered released pending a proceeding under this chapter on personal recognizance or upon the execution of an unsecured appearance bond in an amount specified by the judicial officer, unless the officer determines that at a hearing the Government has shown by the preponderance of the evidence that such a release will not assure the appearance of the person as required, assure the safety of another person or the community, or carry out the obligations of the United States under the applicable treaty concerning



extradition. If the judicial officer so determines, the judicial officer may, either in lieu of or in addition to such methods of release, order such person detained after a hearing on a motion for detention under paragraph (10) of this subsection or impose any of or any combination of the following conditions of release which will give the required assurances and carry out such obligations:

(A) Place the accused person in the custody of a designated person or organization agreeing to supervise such accused person.

(B) Place restrictions on the travel, association, or place of abode of the person during the period of release.

(C) Require the execution of an appearance bond in a specified amount and the deposit in the registry of the court, in cash or other security as directed, of a sum not to exceed 10 per centum of the amount of the bond, such deposit to be returned upon the performance of the conditions of release.

(D) Require the execution of a bail bond with sufficient solvent sureties, or the deposit of cash in lieu thereof.

(E) Impose any other conditions deemed reasonably necessary to give the required assurances and carry out such obligations, including a condition requiring that the person return to custody after specified hours.

(3) In determining which conditions of release will give the required assurances and carry out the obligations of the United States as required, the judicial officer shall, on the basis of available information, take into account--

(A) the nature and circumstances of the offense charged, and the weight of the evidence against the person accused;

(B) such person's family and local ties, financial resources, character, and mental condition;

(C) the length of such person's residence in the community;

(D) such person's record of convictions;

(E) such person's record of appearance at court proceedings or of flight to avoid prosecution or failure to appear at court proceedings;

(F) whether such person is employed or is attending an educational institution;

(G) whether such person is lawfully within the United States;

(H) the existence of any other requests for the extradition of such person other than the one with respect to which release is sought; and

(I) whether such a person is currently on probation, parole, or mandatory release under State or Federal law.

H.R. 2643, supra note 8, § 3199(c)(1) - 3199(c)(3); H.R. 6046, supra note 5, § 3199(c)(1) - 3199(c)(3). These detailed criteria and conditions were not included in the original House bill, which contained only a general statement regarding bail. See H.R. 5227, supra note 2, § 3198(c)(2).

175. H.R. 2643, supra note 8, § 3195(a)(3)(A); H.R. 6046, supra note 5, § 3195(a)(3)(A); H.R. 5227, supra note 2, § 3195(a)(3)(A). Under domestic law, a defendant appealing a conviction is denied release on bail if it appears that there is a risk of flight, a risk of danger to others, or if "it appears that an appeal is frivolous or taken for delay." 18 U.S.C. § 3148 (1976). The burden of proving or negating these factors is not allocated by the statute. However, according to Fed. R. App. P. 9(c), the burden is placed upon the defendant. See *United States v. Provenzano*, 605 F.2d 85, 94-95 (3d Cir. 1979), which discusses, but accepts, this allocation of the burden of proof which seems clearly contrary to the con-

gressional intent behind the Bail Reform Act to place the burden of proof upon the government to demonstrate that release should not be granted.

176. U.S. Const., amend. VIII, states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments imposed."

177. *Bandy v. United States*, 82 S. Ct. 11, 12 (Douglas, Circuit Justice 1961); *Fernandez v. United States*, 81 S. Ct. 642, 645 (Harlan, Circuit Justice 1961); *Hirt v. Roth*, 648 F.2d 1148 (8th Cir. 1981); *Cobb v. Aytch*, 643 F.2d 946, 962 (3d Cir. 1981). See also *Schlib v. Kuebel*, 404 U.S. 357, 365 (1971) ("[B]ail . . . is basic to our system of law"); *Stack v. Boyle*, 342 U.S. 1, 4 (1951) (the "traditional right" to bail "serves to prevent infliction of punishment prior to conviction").

178. This conclusion is warranted in spite of the fact that the House Judiciary Committee ostensibly rejected the per se incorporation of the Bail Reform Act, see House Judiciary Report on H.R. 6046, supra note 23, at 5. First, in spite of the House bill's statement that 18 U.S.C. §§ 3141, 3144, 3146(a), 3146(b), 3148 and 3150 (i.e., provisions of the Bail Reform Act) do not per se apply although all other sections of Chapter 207 do per se apply (including other sections of the Bail Reform Act), see H.R. 2643, supra note 8, § 3199(c)(1); H.R. 6046, supra note 5, § 3199(c)(1), the bill nevertheless goes on to provide that "the release of a person under this subsection shall be deemed a release under section 3146(a).

57 Tex. L. Rev. 275 (1979), it has been accepted by the courts. See United States v. Provenzano, 605 F.2d 85, 95 n. 50 (3d Cir. 1979).

183. S. 220, supra note 7, § 3192(d)(1); S. 1940, supra note 5, § 3192(d)(1); S. 1639, supra note 1, § 3192(d)(1).

184. See Caltagirone v. Grant, 629 F.2d 739 (2d Cir. 1980); Wright v. Henkel, 190 U.S. 40 (1903).

185. See S. 220, supra note 7, § 3195(b)(1); S. 1940, supra note 5, § 3195(b)(1); S. 1639, supra note 1, § 3195(b)(1).

186. See 2 Bassiouni, U.S. International Extradition, supra note 12, at Chap. IX, § 4.

187. See House Judiciary Report on H.R. 6046, supra note 23, at 12. The rule of specialty

stands for the proposition that the requesting state which secures the surrender of a person can prosecute that person only for the offense for which he or she was surrendered by the requested state or else allow that person an opportunity to leave the prosecuting state to which he or she had been surrendered.

Bassiouni, U.S. International Extradition, supra note 12, at Chap. VII, § 6, p. 1.

188. S. 220, S. 1940, and S. 1639 state that

The court, upon being informed of the person's consent to removal, shall . . . address the person to determine whether his consent is . . . given with full knowledge of its consequences, including the fact that it may not be revoked after the court has accepted it.

S. 220, supra note 7, § 3193(b)(2)(B); S. 1940, supra note 5, § 3193(b)(2)(B); S. 1639, supra note 1, § 3193(b)(2)(B).

189. H.R. 2643, supra note 8, § 3193(a); H.R. 6046, supra note 5, § 3193(a); H.R. 5227, supra note 2, § 3193(a).

190. See House Judiciary Report on H.R. 6046, supra note 23, at 13.

191. S. 220, supra note 7, § 3193(b) (1); S. 1940, supra note 5, § 3193(b) (1); S. 1639, supra note 1, § 3193(b) (1); H.R. 2643, supra note 8, § 3193(b) (1); H.R. 6046, supra note 5, § 3193(b) (1); H.R. 5227, supra note 2, § 3193(b) (1).

192. S. 220, S. 1940, and S. 1639 require that

[t]he court, upon being informed of the person's consent to removal, shall--

(1) inform the person that he has a right to consult with counsel and that, if he is financially unable to obtain counsel, counsel may be appointed to represent him pursuant to section 3006A; and

(2) address the person to determine whether his consent is--

(A) voluntary, and not the result of a threat or other improper inducement; and

(B) given with full knowledge of its consequences, including the fact that it may not be revoked after the court has accepted it.

S. 220, supra note 7, § 3193(b); S. 1940, supra note 5, § 3193(b); S. 1639, supra note 1, § 3193(b).

H.R. 2643, H.R. 6046, and H.R. 5227 contain a similar requirement, by providing that

[t]he court shall--

(1) inform a person making a waiver under this section of such person's right to representation by counsel, including counsel appointed without cost to such person if such person is financially unable to obtain counsel; and

(2) inquire of such person and determine whether such waiver is--

(A) voluntary and not the result of threat or other improper inducement; and



. . . " See H.R. 2643, supra note 8, § 3199(c)(1); H.R. 6046, supra note 5, § 3199(c)(1). 18 U.S.C. § 3146(a) is a major provision of the Bail Reform Act, setting forth conditions of release which the court may impose. Second, the language of this section of the Bail Reform Act and 18 U.S.C. § 3146(b), also from the Bail Reform Act which sets forth criteria the court is to use in setting conditions of release, are virtually identical to the corollary provisions of the House bill.

In further support of the conclusion that the House version intends the applicability of the jurisprudential interpretations of the Bail Reform Act in spite of the bill's ostensible rejection of certain provisions of the Act per se, the reader should also bear in mind the following:

1. there was no need to incorporate the applicability of 18 U.S.C. § 3141 into extradition proceedings, since this section establishes the general power of courts and magistrates to release persons on bail and such authority in extradition proceedings is explicitly stated in the House bill at § 3199(c)(1);

2. there was no need to incorporate the applicability of 18 U.S.C. § 3144 into extradition proceedings, since this section establishes the power of courts and magistrates to impose additional bail if it appears that bail is insufficient to prevent the person from fleeing the jurisdiction, and such authority in extradition proceedings is provided for in the House bill in § 3199(c)(7);

3. there was no need to incorporate the applicability of 18 U.S.C. § 3148 regarding release in capital cases or after conviction into extradition proceedings, since neither of these kinds of situations arises in an extradition proceeding;

4. there was no need to incorporate the applicability of § 3150 regarding penalties for failure to appear into extradition proceedings, since this provision allocates the penalties according to distinctions as to charge, conviction, etc., that are not readily applicable to extradition proceedings.

179. See House Judiciary Report on H.R. 6046, supra note 23, at 11.

180. H.R. 2643, supra note 8, § 3195(a)(3); H.R. 6046, supra note 5, § 3195(a)(3).

181. H.R. 2643, supra note 8, § 3195(a)(3)(A)(III); H.R. 6046, supra note 5, & 3195(a)(3)(A)(III).

182. Such a challenge would, first, require a reconsideration of the rationale of *Wright v. Henkel*, 190 U.S. 40 (1903). Given the increased general availability of international travel created by jet airplanes, it no longer seems reasonable to assume that persons suspected of having committed crimes in foreign countries are more likely to flee the United States than persons suspected of having committed crimes within the United States. A challenge to bail procedure on appeal would entail a challenge to the domestic procedure as well. Although Fed. R. App. P. 9(c) has been rather ably criticized by one commentator, see Note, "Bail Pending Appeal in Federal Court: The Need for a Two-Tiered Approach,"

(B) given with full knowledge of its legal consequences.

H.R. 2643, supra note 8, § 3193(b); H.R. 6046, supra note 5, § 3193(b); H.R. 5227, supra note 2, § 3193(b).

193. Neither the Senate nor the House Judiciary Report addresses this issue. See Senate Judiciary Report on S. 1940, supra note 15, at 10-11; House Judiciary Report on H.R. 6046, supra note 23, at 12-13. The Senate Report merely notes that the provision was included to be consistent with 18 U.S.C. §§ 4107-4108 (1976) regarding "a prisoner's voluntary consent to transfer to his country of nationality under treaties on the execution of penal sanctions." Senate Judiciary Report on S. 1940, supra note 15, at 10. The House Report notes that the requirements that the consent be voluntary and with knowledge of its legal consequences is derived from domestic law regarding acceptance of guilty pleas. House Judiciary Report on H.R. 6046, supra note 23, at 13. It would seem to follow, therefore, that the same sanction would attach for failure to satisfy these requirements--i.e., revocation of the consent and vacation of the order.

194. These observations were also made by this author at congressional hearings on the bills. See Senate Judiciary Hearings on S. 1639, supra note 23, at 20; House Judiciary Hearings on H.R. 5227, supra note 4, at 103; House Foreign Relations Hearings on H.R. 6046, supra note 27.

195. See 1 Bassiouni, U.S. International Extradition, supra note 12, at Chap. VII, § 6.

196. See id. These observations and suggestions were made by this writer at hearings on S. 1639, H.R. 5227, and H.R. 6046. See Senate Judiciary Hearings on S. 1639, supra note 3, at 20; House Judiciary Hearings on H.R. 5227, supra note 4, at 99, 103; House Foreign Relations Hearings on H.R. 6046, supra note 27.

197. See 1 Bassiouni, U.S. International Extradition, supra note 12, at Chap. VII, § 6.

198. In fact, the Senate bill requires that "[t]he court shall order that the person be held in official detention until surrendered." S. 220, supra note 7, § 3193(c); S. 1940, supra note 5, § 3193(c); S. 1639, supra note 1, § 3195(c). The Senate Judiciary Report made no reference to whether a relator should be released pending delivery when he has waived the extradition hearing. See Senate Judiciary Report on S. 1940, supra note 15, at 10-11.

199. H.R. 2643, supra note 8, § 3199(c); H.R. 6046, supra note 5, § 3199(c); H.R. 5227, supra note 2, § 3198(c).

200. The House Judiciary Report made no reference to whether a relator should be released pending delivery when he has waived the extradition hearing. See House Judiciary Report on H.R. 6046, supra note 23, at 12-13.

201. The bill provides:

LIMITATION ON DETENTION PENDING REMOVAL--  
A person whom the court orders surrendered pursuant to subsection (c) may, upon reasonable notice to the Secretary of State, petition the court for release from official detention if, excluding any time during which removal is delayed by judicial proceedings, the person is not

removed from the United States within thirty days after the court ordered the person's surrender. The court may grant the petition unless the Secretary of State, through the Attorney General, shows good cause why the petition should not be granted.

S. 220, supra note 7, § 3193(d); S. 1940, supra note 5, § 3193(d); S. 1639, supra note 1, § 3193(d).

202. Furthermore, no standard for "good cause" is provided in the Judiciary Committee's Report. See Senate Judiciary Report on S. 1940, supra note 15, at 10-11.

203. This requirement is stated, not in the section regarding waiver, but in the section regarding surrender of the relator after the hearing. In full, the subsection provides:

The court shall, upon petition after reasonable notice to the Secretary of State by a person ordered extraditable under this chapter, dismiss the complaint against that person and dissolve the order of extraditability if that person has not been removed from the United States by the end of thirty days after--

(1) surrender has been ordered by the Secretary of State in the case of a person ordered extraditable after a hearing under this section; or

(2) certification of transcript under section 3193 of this title in the case of a person making a waiver under such section;

unless the Attorney General shows good cause why such petition should not be granted.

H.R. 6046, supra note 5, § 3196(c); H.R. 2643, supra note 8, § 3196(c). The original House bill contained no provision to limit the period of the relator's detention in the event he had waived the extradition hearing and consented to removal.



204. Id.

205. This is true in the Senate and House Judiciary Committees' Report on the bill as well. See Senate Judiciary Report on S. 1940, supra note 15, at 10-11; House Judiciary Report on H.R. 6046, supra note 23, at 12-13.

206. S. 220, S. 1940, and S. 1639 state this requirement in subsection (c), which provides that the court, upon finding that the relator's "consent to removal is voluntary and given with full knowledge of its consequences, shall, unless the Attorney General notifies the court that the foreign state or the United States objects to such removal, order the surrender of the relator." S. 220, supra note 7, § 3193(c); S. 1940, supra note 5, § 3193(c); S. 1639, supra note 1, § 3193(c). H.R. 2643, H.R. 6046, and H.R. 5227 provide for this requirement in subsection (a), which states that the relator may waive the extradition hearing "with the consent of the Attorney General. . . ." H.R. 2643, supra note 8, § 3193(a); H.R. 6046, supra note 5, § 3193(a); H.R. 5227, supra note 2, § 3193(a).

207. Senate Judiciary Report on S. 1940, supra note 15, at 10.

208. See House Judiciary Report on H.R. 6046, supra note 23, at 12.

209. Id. at 13.

210. See Santobello v. New York, 404 U.S. 257 (1971); Bordenbircher v. Hayes, 434 U.S. 357 (1978). See also Westen and Westin, "A Constitutional Law of Remedies for Broken Plea

Bargains," 66 Calif. L. Rev. 471 (1978). It is important in this context to also consider the role of the judge in this process. See, e.g., Alschuler, "The Trial Judge's Role in Plea Bargaining, Part I," 76 Colum. L. Rev. 1059 (1976).

211. The provision regarding appeal, Section 3195, is discussed at notes 339-74 and accompanying text infra.

212. See Senate Judiciary Report on S. 1940, supra note 15, at 10; House Judiciary Report on H.R. 6046, supra note 23, at 12.

213. See Fed. R. Crim. Proc. 54(b)(5); Fed. R. Evid. 1101(d)(3).

214. See S. 220, supra note 7, § 3192(c), S. 1940, supra note 5, § 3192(c), S. 1639, supra note 1, § 3192(c) (applicability of Fed. R. Crim. Pro. 4(d) to arrest warrant standards); H.R. 2643, supra note 8, § 3192(d)(1), H.R. 6046, supra note 5, § 3192(d)(1), H.R. 5227, supra note 1, § 3192(d)(1) (applicability of Fed. R. Crim. Pro. to arrest warrant standards); H.R. 2643, supra note 8, § 3194(g)(1)(B), H.R. 6046, supra note 5, § 3194(g)(1)(B), H.R. 5227, supra note 1, § 3194(g)(1)(B) (applicability of Fed. R. Evid. to admissibility of authenticated documents).

215. See Senate Judiciary Report on S. 1940, supra note 15, at 8 (Fed. R. Crim. Pro. 4(d) applicable to arrest warrants; Rule 5 applicable to requirement that relator appear before court without unnecessary delay); id. at 17 (Rule 5.1 applicable to determination of probable cause to extradite); id. at 16 (Fed. R. Evid. 901(a) and 902(3) applicable to

authentication of documents); House Judiciary Report on H.R. 6046, supra note 23, at 10 (Fed. R. Crim. Pro. 4(d) applicable to arrest warrants); id. at 16 (Rule 5 applicable to requirement that relator appear before court without unnecessary delay); id. at 15 (Fed. R. Evid. applicable to extradition hearings). See also Senate Judiciary Report on S. 1940, supra note 15, at 15 (relator's right to counsel analogized to 18 U.S.C. § 3401); id. at 18 (Fed. R. App. Pro. applicable to appeal section); House Judiciary Report on H.R. 6046, supra note 23, at 13 (consent to waiver analogized to guilty pleas); id. at 16 (relator's right to counsel analogized to 18 U.S.C. § 4214); id. at 17 (federal probable cause for arrest standard applicable to extradition proceedings); id. at 28 (Fed. R. App. Pro. applicable to appeal section).

216. See supra note 11 and accompanying text.

217. See Senate Judiciary Report on S. 1940, supra note 15, at 3-5; House Judiciary Report on H.R. 6046, supra note 23, at 2-5.

218. See, e.g., Senate Judiciary Report on S. 1940, supra note 15, at 11, 12, 13, 15, 16, 17; House Judiciary Report on H.R. 6046, supra note 23, at 13, 14, 15, 16, 17, 18, 19, 20.

219. S. 220, supra note 7, § 3194(a); S. 1940, supra note 5, § 3194(a); S. 1639, supra note 1, § 3194(a); H.R. 2643, supra note 8, § 3194(a); H.R. 6046, supra note 5, § 3194(a); H.R. 5227, supra note 2, § 3194(a).

220. S. 220, supra note 7, § 3194(a). S. 1940 and S. 1639 did not include the phrase "as provided in subsection (d)." See S. 1940, supra note 5, § 3194(a); S. 1639, supra note 1, § 3194(a).

221. H.R. 2643, supra note 8, § 3194(a); H.R. 6046, supra note 5, § 3194(a); H.R. 5227, supra note 2, § 3194(a).

222. S. 220, supra note 7, § 3194(a); S. 1940, supra note 5, § 3194(a); S. 1639, supra note 1, § 3194(a).

223. S. 220, supra note 7, § 3194(a)(1)-3194(a)(3). S. 1940 and S. 1639 stated that "the court does not have jurisdiction to determine the merits of the charge," or whether the requesting state "is seeking the extradition of the person . . . for the purpose of prosecuting or punishing the person for his political opinions." S. 1940, supra note 5, § 3194; S. 1639, supra note 1, § 3194. Thus, it did not provide here for the relator's persecution because of his race, religion, or nationality. In addition, S. 1940 and S. 1639 did not provide in this subsection that the court does not have jurisdiction to determine whether the relator's return would be incompatible with humanitarian considerations. Instead, they simply stated in another subsection that such determination is solely within the discretion of the Secretary of State. S. 1940, supra note 5, § 3194(g)(2); S. 1639, supra note 1, § 3194(g)(2). The earlier Senate bills also did not state the limitations on the court's jurisdiction as separate subsections; this was provided for in a single paragraph. S. 1940, supra note 5, § 3194(a); S. 1639, supra note 1, § 3194(a). The

original enacted version of S. 1940 published in the Congressional Record also included language in this section that the court did not have jurisdiction "to determine whether the foreign state is seeking the extradition of the person for a political offense, [or] for an offense of a political character." 128 Cong. Rec. S10882 (daily ed. Aug. 19, 1982). This language first appeared in S. 1639, and was approved by the Senate Judiciary Committee. See Senate Judiciary Report on S. 1940, supra note 15, at 33. It was deleted by the Senate Foreign Relations Committee. See Senate Foreign Relations Report on S. 1940, supra note 20, at 18.

224. H.R. 2643, supra note 8, § 3194(b)(2); H.R. 6046, supra note 5, § 3194(b)(2); H.R. 5227, supra note 2, § 3194(b)(2).

225. The Senate bill provides for the following:

(b) RIGHTS OF THE PERSON SOUGHT.--The court shall inform the person of the limited purpose of the hearing, and shall inform him that--

(1) he has the right to be represented by counsel and that, if he is financially unable to obtain counsel, counsel may be appointed to represent him pursuant to section 3006A; and

(2) he may cross-examine witnesses who appear against him and may introduce evidence in his own behalf with respect to the matters set forth in subsection (d).

S. 220, supra note 7, § 3194(b); S. 1940, supra note 5, § 3194(b); S. 1639, supra note 1, § 3194(b).

The House version states the relator's rights in these terms:

(b) (1) At a hearing under this section,



the person sought to be extradited has the right--

(A) to representation by counsel, including counsel appointed without cost to such person if such person is financially unable to obtain counsel;

(B) to confront and cross-examine witnesses; and

(C) to introduce evidence with respect to the issues before the court.

H.R. 2643, supra note 8, § 3194(b)(1); H.R. 6046, supra note 5, § 3194(b)(1); H.R. 5227, supra note 2, § 3194(b)(1).

226. See note 224 supra. Oddly, the Senate Judiciary Report notes that this subsection of the bill is governed by 18 U.S.C. § 3401 (1979) regarding the jurisdiction of U.S. magistrates to try persons accused of misdemeanors. See Senate Judiciary Report on S. 1940, supra note 15, at 15.

227. The House Judiciary Report, similarly, makes no reference to other legislation or case law which would provide guidelines as to the scope and limitations of this right. See House Judiciary Report on H.R. 6046, supra note 23, at 16.

228. See supra note 225.

229. H.R. 2643, H.R. 6046, and H.R. 5227 state: "At a hearing under this section, the person sought has the right-- (a) to representation by counsel. . . ." H.R. 2643, supra note 8, § 3194(b)(1)(A); H.R. 6046, supra note 5, § 3194(b)(1)(A); H.R. 5227, supra note 2, § 3194(b)(1)(A).

230. S. 220, supra note 7, § 3194(b)(2); S. 1940, supra note 5, § 3194(b)(2); S. 1639, supra note 1, § 3194(b)(2).

231. H.R. 2643, supra note 8, § 3194(b)(1)(B); H.R. 6046, supra note 5, § 3194(b)(1)(B); H.R. 5227, supra note 2,

§ 3194(b) (1) (B). The House Judiciary Report noted that this term was taken from 18 U.S.C. § 4214 (1976) relating to revocation of parole. See House Judiciary Report on H.R. 6046, supra note 23, at 16. Section 4214(a) (2), regarding the hearing to determine whether parole should be revoked, provides that the Parole Commission shall conduct the hearing according to the following procedures:

(A) notice to the parolee of the conditions of parole alleged to have been violated, and the time, place, and purposes of the scheduled hearing;

(B) opportunity for the parolee to be represented by an attorney (retained by the parolee, or if he is financially unable to retain counsel, counsel shall be provided pursuant to section 3006A) or, if he so chooses, a representative as provided by rules and regulations, unless the parolee knowingly and intelligently waives such representation.

(C) opportunity for the parolee to appear and testify, and present witnesses and relevant evidence on his own behalf; and

(D) opportunity for the parolee to be apprised of the evidence against him and, if he so requests, to confront and cross-examine adverse witnesses, unless the Commission specifically finds substantial reason for not so allowing.

18 U.S.C. § 4214(a) (2) (A)-(a) (2) (D) (1976) (emphasis added).

See also United States v. Caldera, 631 F.2d 1227 (5th Cir.

1980) (failure to provide parolee with adequate cross-examination required new evidentiary hearing); Ready v. U.S. Parole Comm'n, 483 F. Supp. 1273 (D.C. Pa. 1980) (parolee's right to cross-examine witnesses can be denied upon a showing of "good cause"); Galante v. U.S. Parole Comm'n, 466 F. Supp.

1266 (D.C. Conn. 1979) (good cause shown where witness' appearance would subject him to risk of harm).

232. The House Judiciary Report indicated, however, that

[t]his right obviously does not expand the right of the person being sought to call as witnesses persons who prepared documents, because in many situations the ordinary rules of evidence allow the use of documents without requiring the presence of the author.

House Judiciary Report on H.R. 6046, supra note 23, at 16.

233. S. 220, supra note 7, § 3194(b)(2); S. 1940, supra note 5, § 3194(b)(2); S. 1639, supra note 1, § 3194(b)(2).

234. Subsection (d) provides

(d) FINDINGS.--The court shall find that the person is extraditable if it finds that--

(1) there is probable cause to believe that the person arrested or summoned to appear is the person sought in the foreign state;

(2) the evidence presented is sufficient to support the complaint under the provisions of the applicable treaty;

(3) no defense to extradition specified in the applicable treaty, and within the jurisdiction of the court, exists; and

(4) the act upon which the request for extradition is based would constitute an offense punishable under the laws of--

(A) the United States;

(B) the State where the fugitive is found; or

(C) a majority of the States.

The court may base a finding that a person is extraditable upon evidence consisting, in whole or in part, of hearsay or of properly certified documents.

S. 220, supra note 7, § 3194(d); S. 1940, supra note 5, § 3194(d); S. 1639, supra note 1, § 3194(d).

235. The House bill requires the following findings:

Except as otherwise provided in this chapter, the court shall order a person extraditable after a hearing under this section if the court finds--

(A) probable cause to believe that the person before the court is the person sought;

(B) (i) probable cause to believe that the person before the court committed the offense for which such person is sought; or

(ii) the evidence presented is sufficient to support extradition under the provisions of the applicable treaty concerning extradition; and

(C) the conduct upon which the request for extradition is based--

(i) would be punishable under the laws of--

(I) the United States;

(II) the majority of the States of the United States; or

(III) the State where the fugitive is found; and

(ii) (I) at least one such offense is punishable by a term of more than one year's imprisonment, in the case of a person before the court who is sought for trial; or

(II) more than one hundred and eighty days of imprisonment remain to be served with respect to such offense; in the case of a person before the court who is sought for imprisonment.

H.R. 2643, supra note 8, § 3194(d)(1); H.R. 6046, supra note 5, § 3194(d)(1); H.R. 5227, supra note 2, § 3194(d)(1).

236. H.R. 2643, supra note 8, § 3194(b)(1)(C); H.R. 6046, supra note 5, § 3194(b)(1)(C); H.R. 5227, supra note 2, § 3194(b)(1)(C).

237. S. 220, supra note 7, § 3194(b); S. 1940, supra note 5, § 3194(b); S. 1639, supra note 1, § 3194(b); H.R.

2643, supra note 8, § 3194(c); H.R. 6046, supra note 5, § 3194(c); H.R. 5227, supra note 2, § 3194(c).

238. S. 220, supra note 7, § 3194(b); S. 1940, supra note 5, § 3194(b); S. 1639, supra note 1, § 3194(b).

239. Fed. R. Crim. Pro. 5 quoted at note 147, supra. The House Judiciary Committee explicitly recognized the analogy to Rule 5, elaborating that "[t]he requirement of a prompt hearing parallels the right of a criminal defendant to obtain a prompt determination of probable cause." House Judiciary Report on H.R. 6046, supra note 23, at 16. The Senate Judiciary Committee's observation of the analogy to Rule 5 was made regarding the bill's requirement that the relator "be taken without unnecessary delay before the nearest available court for an extradition hearing" in Section 3192(c). See Senate Judiciary Report on S. 1940, supra note 15, at 8. The Report made no observation on Section 3194(a)'s requirement that the hearing be held "as soon as practicable" after the relator's arrest or the issuance of a summons. Because the Report notes that one of the purposes of the new bill is to "codif[y] the right of a fugitive to legal representation and to a speedy determination of an extradition request," id. at 5, however, it can be reasonably inferred that the Committee intended the analogy to Rule 5 to apply to this latter section of the bill as well.

240. In addition, there is no mention of sanction in either the Senate or House Judiciary Report. See Senate



Judiciary Report on S. 1940, supra note 14, at 13-14; House Judiciary Report on H.R. 6046, supra note 22, at 16.

241. See Caltagirone v. Grant, 629 F.2d 739 (2d Cir. 1980); Sabatier v. Dambrowski, 453 F. Supp. 1250 (D.R.I. 1978); Freedman v. United States, 437 F. Supp. 1252 (N.D. Ga. 1977).

242. The provision regarding appeal, Section 3195, is discussed at notes 336-71 and accompanying text infra.

243. See Klepfer v. North Carolina, 386 U.S. 213 (1967); Smith v. Hoey, 393 U.S. 374 (1969) (concerning imprisoned defendants); Barker v. Wingo, 407 U.S. 514 (1972); United States v. Strunk, 467 F.2d 969 (7th Cir. 1972), aff'd, Strunk v. United States, 412 U.S. 434 (1973). See also Uviller, "Barker v. Wingo: Speedy Trial Gets a Fast Shuffle," 72 Colum. L. Rev. 1376 (1972); Amsterdam, "Speedy Criminal Trial: Rights and Remedies," 27 Stanford L. Rev. 575 (1975). Concerning the rights of defendants to speedy disposition, see United States v. Lovasco, 431 U.S. 783 (1977).

244. See 2 Bassiouni, U.S. International Extradition, supra note 17, at Chap. IX, § 4.

245. See supra note 232.

246. See supra note 231.

247. See Senate Judiciary Report on S. 1940, supra note 15, at 10; House Judiciary Report on 6046, supra note 23, at 14.

248. In fact, the House Judiciary Committee posited that the "Act" does not give the relator any greater right to do so

than that provided for in current jurisprudence. See supra note 232.

249. S. 220, supra note 7, § 3194(c)(1); S. 1940 supra note 5, § 3194(c)(1); S. 1639, supra note 1, § 3194(c)(1); H.R. 2643, supra note 8, § 3194(g)(1); H.R. 6046, § 3194(g)(1); H.R. 5227, supra note 2, § 3194(g)(1).

250. H.R. 2643, supra note 8, § 3194(g)(1)(B); H.R. 6046, supra note 5, § 3194(g)(1)(B); H.R. 5227, supra note 2, § 3194(g)(1)(B).

251. S. 220, supra note 7, § 3194(c)(1)(A); S. 1940, supra note 5, § 3194(c)(1)(A); S. 1639, supra note 1, § 3194(c)(1)(A).

252. S. 220, supra note 7, § 3194(c)(1)(C); S. 1940, supra note 5, § 3194(c)(1)(C); S. 1639, supra note 1, § 3194(c)(1)(C).

253. S. 220, supra note 7, § 3194(c)(2); S. 1940, supra note 5, § 3194(c)(2); S. 1639, supra note 1, § 3194(c)(2); H.R. 2643, supra note 8, § 3194(g)(2); H.R. 6046, supra note 5, § 3194(g)(2); H.R. 5227, supra note 2, § 3194(g)(2).

254. S. 220, supra note 7, § 3194(c)(2); S. 1940, supra note 5, § 3194(c)(2); S. 1639, supra note 1, § 3194(c)(2).

255. Id.

256. H.R. 2643, supra note 8, § 3194(g)(2); H.R. 6046, supra note 5, § 3194(g)(2); H.R. 5227, supra note 2, § 3194(g)(2).

257. S. 220, supra note 7, § 3194(d); S. 1940, supra note 5, § 3194(d); S. 1639, supra note 1, § 3194(d); H.R.

2643, supra note 8, § 3194(g)(3); H.R. 6046, supra note 5, § 3194(g)(3); H.R. 5227, supra note 2, § 3194(g)(3).

258. S. 220, supra note 7, § 3194(c)(3); S. 1940, supra note 5, § 3194(c)(3); S. 1639, supra note 1, § 3194(c)(3); H.R. 2643, supra note 8, § 3194(h); H.R. 6046, supra note 5, § 3194(h); H.R. 5227, supra note 2, § 3194(h).

259.

260. See *Hu Yau-Leung v. Soscia*, 679 F.2d 914, 916-18 (2d Cir. 1981); *Caplan v. Vokes*, 649 F.2d 1336, 1343 (9th Cir. 1981); *Brauch v. Raiche*, 618 F.2d 843, 847 (1st Cir. 1980); *Jimenez v. Aristeguieta*, 311 F.2d 547, 562-63 (5th Cir. 1962). See also *Matter of Assarsson*, 635 F.2d 1237, 1245 (7th Cir. 1980) (treaty provision allowing extradition for offense which is not a crime in United States is permissible).

261. See generally 1 Bassiouni, U.S. International Extradition, supra note 12, at Chap. VII, § 3.

262. H.R. 2643, supra note 8, § 3194(d)(1)(C); H.R. 6046, supra note 5, § 3194(d)(1)(C); H.R. 5227, supra note 2, § 3194(d)(1)(C). S. 220, S. 1940, and S. 1639 list these same three sources, but states them as: (1) the laws of the United States; (2) the laws of the state where the relator is found; or (3) the laws of the majority of states. S. 220, supra note 7, § 3194(d)(4); S. 1940, supra note 5, § 3194(d)(4); S. 1639, supra note 2, § 3194(d)(4).

263. See Senate Judiciary Hearings on S. 1639, supra note 3, at 22 (testimony of M. Cherif Bassiouni); House Judi-

ciary Hearings on H.R. 5227, supra note 4, at 99 (testimony of M. Cherif Bassiouni).

264. American Law Institute, Model Penal Code and Commentaries (1980).

265. See generally M.C. Bassiouni, Substantive Criminal Law (1978).

266. See House Judiciary Hearings on H.R. 5227, supra note 4, at 103.

267. The House bill requires that at least one offense must be punishable by "a term of more than one year's imprisonment, in the case of a person before the court who is sought for trial; or [that] more than one hundred and eighty days of imprisonment remain to be served with respect to such offense, in the case of a person before the court who is sought for imprisonment." H.R. 2643, supra note 8, § 3194(d)(1)(C)(ii); H.R. 6046, supra note 5, § 3194(d)(1)(C)(ii). This provision was not included in the original House bill, H.R. 5227, and was inserted in the subsequent drafts.

268. See 1 Bassiouni, U.S. International Extradition, supra note 12, at Chap. VII, § 5.

269. H.R. 2643, supra note 8, § 3194(d)(1)(A); H.R. 6046, supra note 5, § 3194(d)(1)(A); H.R. 5227, supra note 2, § 3194(d)(1)(A). S. 220, S. 1940, and S. 1639 state that "[t]he court shall find that the person is extraditable if it finds that-- (1) there is probable cause to believe that the person arrested or summoned to appear is the person sought in the foreign state. . . ." S. 220, supra note 7, § 3194(d)(1);

S. 1940, supra note 5, § 3194(d)(1); S. 1639, supra note 1, § 3194(d)(1).

270. S. 220, supra note 7, § 3194(d)(2); S. 1940, supra note 5, § 3194(d)(2); S. 1639, supra note 1, § 3194(d)(2).

271. H.R. 2643, supra note 8, § 3194(d)(1)(B); H.R. 6046, supra note 5, § 3194(d)(1)(B); H.R. 5227, supra note 2, § 3194(d)(1)(B).

272. See 18 U.S.C. § 3184 (1976). Since the Supreme Court's decisions in *Collins v. Loisel*, 259 U.S. 309 (1922), and *Fernandez v. Phillips*, 268 U.S. 311 (1925), the appellate courts have consistently required a showing of "probable cause" without expressly making that showing a constitutional requirement. See, e.g., *Eain v. Wilkes*, 641 F.2d 504, 5075-08 (7th Cir. 1981), cert. denied, 102 S. Ct. 390 (1982); *Antones v. Vance*, 640 F.2d 3, 4-5 (4th Cir. 1981); *Escobedo v. United States*, 623 F.2d 1098, 1102 (5th Cir. 1980); *Brauche v. Raiche*, 618 F.2d 843, 854 (1st Cir. 1980); *Hooker v. Klein*, 573 F.2d 1360, 1367, 1369 (9th Cir. 1978); *Jhirad v. Ferrandina*, 536 F.2d 478, 485 (2d Cir. 1976).

273. At hearings before the Senate Judiciary Committee, this writer noted that such a provision would likely be found unconstitutional: as the Fourth Amendment requires "probable cause" for a relator's arrest, it is difficult to conceive how the relator could be arrested only upon a showing of probable cause but could be subsequently extradited without "probable cause." See Senate Judiciary Hearings on S. 1639, supra note 3, at 21.



274. House Judiciary Report on H.R. 6046, supra note 23, at 17.

275. See supra note 78.

276. See supra notes 65-81 and accompanying text regarding the use of multilateral international criminal law conventions.

277. See Caltagirone v. Grant, 629 F.2d 739 (2d Cir. 1980).

278. S. 220, supra note 7, § 3194(d); S. 1940, supra note 5, § 3194(d); S. 1639, supra note 1, § 3194(d); H.R. 2643, supra note 8, § 3194(g)(3); H.R. 6046, supra note 5, § 3194(g)(3); H.R. 5227, supra note 2, § 3194(g)(3).

279. E.g., Simmons v. Braun, 627 F.2d 635, 636 (2d Cir. 1980); O'Brien v. Rozman, 554 F.2d 780, 782 (6th Cir. 1977) (per curiam); Magisano v. Locke, 545 F.2d 1228, 1230 (9th Cir. 1976).

280. Spinelli v. United States, 393 U.S. 410, 412 (1969); McCray v. Illinois, 386 U.S. 300, 311 (1967).

281. See Illinois v. Gates, \_\_\_ U.S. \_\_\_, 103 S. Ct. 2317 (1983), reversing Spinelli v. United States, 393 U.S. 410 (1969); Aguilar v. Texas, 378 U.S. 108 (1964). See also Franks v. Delaware, 438 U.S. 154, 165 (1978).

282. E.g., O'Brien v. Rozman, 554 F.2d 780, 783 (6th Cir. 1977); Greci v. Birknes, 527 F.2d 956, 958 (1st Cir. 1976); United States ex rel. Sakaguchi v. Kaulukukui, 520 F.2d 726, 730 (9th Cir. 1975); Shapiro v. Ferrandina, 478 F.2d 894, 901-902 (2d Cir. 1973). But see Freedman v. United States,

437 F. Supp. 1252, 1256 (N.D. Ga. 1977) ("the question of reliability may come into focus").

283. E.g., Caplan v. Vokes, 649 F.2d 1336 (9th Cir. 1981); In re Williams, 496 F. Supp. 16 (S.D.N.Y. 1979).

284. See, e.g., Beaulieu v. Hartigan, 554 F.2d 1 (1st Cir. 1977); Garcia-Guillern v. United States, 450 F.2d 1189 (5th Cir. 1971); In re Extradition of David, 395 F. Supp. 803 (E.D. Ill. 1975), aff'd sub nom. David v. United States, 699 F.2d 411 (7th Cir. 1983).

285. Eain v. Wilkes, 641 F.2d 504, 511 (7th Cir. 1980); Shapiro v. Ferrandina, 478 F.2d 894, 905 (2d Cir. 1973). At the extradition hearing the government also has the opportunity to introduce additional information in order to support the information which accompanied the the initial request for the arrest warrant. Thus in determining whether or not there exists probable cause to extradite, the hearing magistrate is not limited to the four corners of the arrest warrant.

286. Section 3194(b)(2) of the House bill states that "[t]he guilt or innocence of the person sought to be extradited of the charges with respect to which extradition is sought is not an issue before the court." H.R. 2643, supra note 8, § 3194(b)(2); H.R. 6046, supra note 5, § 3194(b)(2); H.R. 5227, supra note 2, § 3194(b)(2). The Senate version states that "[t]he court does not have jurisdiction to determine the merits of the charge against the person by the foreign state. . . ." S. 220, supra note 7, § 3194(a); S. 1940, supra note 5, § 3194(a); S. 1639, supra note 1,

§ 2194(a). See also *Hooker v. Klein*, 573 F.2d 1360, 1368 (9th Cir.), cert. denied, 439 U.S. 932 (1978); *Sayne v. Shipley*, 418 F.2d 679, 685 (5th Cir. 1969). Of course, evidence relevant to establishing a defense available under the applicable treaty is admissible.

287. H.R. 2643, supra note 8, § 3194(b) (1) (C); H.R. 6046, supra note 5, § 3194(b) (1) (C); H.R. 5227, supra note 2, § 3194(b) (1) (C).

288. House Judiciary Report on H.R. 6046, supra note 23, at 16.

289. Fed. R. Evid. 401 states: "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

290. 438 U.S. 154 (1978).

291. Id. at 155-56, 171-72.

292. Id. at 171.

293. See Senate Judiciary Hearings on S. 1639, supra note 3, at 3 (testimony of M. Cherif Bassiouni); House Judiciary Hearings on H.R. 5227, supra note 4, at 101, 106 (testimony of M. Cherif Bassiouni). See generally Bassiouni, U.S. International Extradition, supra note 12, at Chap. IX, §1.

294. See S. 220, supra note 7, § 3194(e); S. 1940, supra note 5, § 3194(e); S. 1639, supra note 1, § 3194(e); H.R. 2643, supra note 8, § 3194(e); H.R. 6046, supra note 5, § 3194(e); H.R. 5227, supra note 2, § 3194(e).

295. See S. 220, supra note 7, § 3194(d)(3); S. 1940, supra note 5, § 3194(d)(3); S. 1639, § 3194(d)(3); H.R. 2643, supra note 8, § 3194(d)(2)(B); H.R. 6046, supra note 5, § 3194(d)(2)(B); H.R. 5227, supra note 2, § 3194(d)(2)(B).

296. See H.R. 2643, supra note 8, § 3194(d)(2)(A); H.R. 6046, supra note 5, § 3194(d)(2)(A); H.R. 5227, supra note 2, § 3194(d)(2)(A).

297. See generally 2 Bassiouni, U.S. International Extradition, supra note 12, at Chap. VIII, § 1.

298. See id. at Chap. V, § 1. See also United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974); United States ex rel. Lujan v. Gengler, 510 F.2d 62 (2d Cir. 1975); United States v. Lira, 515 F.2d 68 (2d Cir. 1975); Waits v. McGowan, 516 F.2d 203 (3d Cir. 1975); United States v. Herrera, 504 F.2d 859 (5th Cir. 1975), cert. denied, 421 U.S. 1001 (1975); David v. United States, 699 F.2d 41 (7th Cir. 1983); United States v. Peltier, 585 F.2d 314 (8th Cir. 1978), cert. denied, 440 U.S. 945 (1979); United States v. Lovato, 520 F.2d 1270 (9th Cir.), cert. denied, 423 U.S. 985 (1975).

299. See Senate Judiciary Hearings on S. 1639, supra note 3, at 2 (testimony of M. Abbell, Dep't of Justice); id. at 8 (testimony of D. McGovern, Dep't of State); id. at 20 (testimony of M. C. Bassiouni, DePaul University College of Law); id. at 28 (testimony of W. Hannay); Senate Foreign Relations Hearings on S. 1940, supra note 20; House Judiciary Hearings on H.R. 5227, supra note 4, at 26 (testimony of R. Olsen and M. Abbell, Dep't of Justice); id. at 31 (testimony

of D. McGovern, Dep't of State); id. at 49 (testimony of D. Carliner, International Human Rights Law Group); id. at 64 (testimony of R. Falk, Princeton University School of Law); id. at 71 (testimony of W. Henderson, ACLU); id. at 85 (testimony of W. Goodman, Topel & Goodman); id. at 98 (testimony of M. C. Bassiouni, DePaul University College of Law); id. at 108 (testimony of S. Lubet, Northwestern University School of Law); id. at 141 (testimony of K. O'Dempsey, Brehon Law Society, R. Capulong, Alliance for Philippine Concerns); id. at 209 (prepared statement of C. Pyle, Mount Holyoke College); House Foreign Affairs Hearings on H.R. 6046, supra note 26. The Senate Judiciary Committee version of S. 1940 placed the political offense exception outside the jurisdiction of the federal court. Instead, it gave the Secretary of State the authority to determine the applicability of the exception. It also established criteria by which this determination was to be made, and provided for appeal of the Secretary's decision, such appeal to be successful if the federal court found that the Secretary's decision was not based on substantial evidence. See Senate Judiciary Report on S. 1940, supra note 14, at 33-36. The Senate Foreign Relations Committee amended S. 1940 by placing the exception under the jurisdiction of the federal courts, and establishing criteria by which the court's determination is to be made. See Senate Foreign Relations Report on S. 1940, supra note 20, at 19-20.

300. S. 220, supra note 7, § 3194(e)(1)(A)-3194(e)(1)(E), 3194(e)(1)(G); S. 1940, supra note 5, §



3194(e)(1)(A)-3194(e)(1)(E), 3194(e)(1)(G); H.R. 2643, supra note 8, 3194(e)(2). The prior House bill, H.R. 6046, provided that these offenses could be deemed "political offenses" in "extraordinary circumstances." See H.R. 6046, supra note 5, § 3194(e)(2)(A)-(e)(2)(D), 3194(e)(2)(G), 3194(e)(2)(H). In addition, this prior bill stated that an offense could not be deemed a "political offense" if it were "an offense with respect to which a treaty obligates the United States to either extradite or prosecute a person accused of the offense," id. § 3194(e)(2)(D) (emphasis added), rather than requiring that such duty to prosecute or extradite be included in a "multilateral treaty," as both Senate bills and the subsequent House bill provide. See S. 220, supra note 7, § 3194(e)(1)(D); S. 1940, supra note 5, § 3194 3194(e)(1)(D); H.R. 2643, supra note 8, § 3194(e)(2)(D).

The original House bill, H.R. 5227, stated that these crimes would not "normally" be considered political offenses. H.R. 5227, § 3194(e)(2)(B). The original Senate bill, S. 1639, did not include a listing of crimes outside the definition of the "political offense exception," since under this bill the entire issue was outside the court's jurisdiction. See S. 1639, supra note 1, § 3194(a).

301. S. 220, supra note 7, § 3194(e)(1)(F); H.R. 2643, supra note 8, § 3194(e)(3)(C); H.R. 6046, supra note 5, § 3194(e)(2)(E); H.R. 5227, supra note 2, § 3194(e)(2)(E); S. 1940, similar to H.R. 6046, provided that the offense of rape

could be considered a political offense in "extraordinary circumstances." See S. 1940, supra note 5, § 3194(e)(2)(A).

302. S. 220, supra, note 7, § 3194(e); S. 1940, supra note 5, § 3194(e); H.R. 2643, supra note 8, § 3194(e)(3); H.R. 6046, supra note 5, § 3194(e)(2)(E), (e)(2)(F), (e)(2)(H); H.R. 5227, supra note 2, § 3194(e)(2)(E), (e)(2)(F), (e)(2)(H).

303. This position was advocated by this writer at Congressional hearings on the "Act." See Senate Judiciary Hearings on S. 1639, supra note 3, at 20; House Judiciary Hearings on H.R. 5227, supra note 4, at 105-106; House Foreign Affairs Hearings on H.R. 6046, supra note 27. See also 2 Bassiouni, U.S. International Extradition, supra note 12, at Chap. VIII, § 2, pp. 1-106; Van den Wijngaert, The Political Offence Exception, supra note 38.

304. Id.

305. Id.

306. See Eain v. Wilkes, 641 F.2d 504 (7th Cir. 1981).

307. See 2 Bassiouni, U.S. International Extradition, supra note 12, at Chap. VIII, § 2, pp. 1-19.

308. See note 299 supra.

309. Id. See also Bassiouni, "The Common Characteristics of Conventional International Criminal Law," 15 Case W. Res. J. Int'l L. \_\_\_\_ (1983) (in print).

310. See Bassiouni, International Criminal Code, supra note 12, at 52-106.

311. Geneva Conventions of August 12, 1949:

- No. I, For the Amelioration of the Wounded and Sick in the Armed Forces of the Field, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31;
- No. II, For the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85;
- No. III, Relative to the Treatment of Prisoners of War, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135;
- No. IV, Relative to the Protection of Civilian Persons in Time of War, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287.

312. The reference to "amendments to the Geneva Conventions" is to provide for the United States' eventual ratification of the Protocols Additional to the Geneva Conventions of August 12, 1949, 10 June 1977, Int'l Rev. Red Cross (Special Issue August-September 1977).

313. Hague Conventions of October 18, 1907: Convention (II) respecting the Limitation of the Employment of Force for the Recovery of Contract Debts, signed at The Hague, 18 October 1907, 3 Martens Nouveau Recueil (3d) 414, 36 Stat. 2241, T.S. No. 537; Convention (III) relative to the Opening of Hostilities, signed at The Hague, 18 October 1907, 3 Martens Nouveau Recueil (3d) 437, 36 Stat. 2259, T.S. No. 538; Convention (IV) respecting the Laws and Customs of War on Land, signed at The Hague, 18 October 1907, 3 Martens Nouveau

Recueil (3d) 461, 36 Stat. 2277, T.S. No. 539; Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, signed at The Hague, 18 October 1907, 3 Martens Nouveau Recueil (3d) 504, 36 Stat. 2310, T.S. No. 540; Convention (VI) relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities, signed at The Hague, 18 October 1907, 3 Martens Nouveau Recueil (3d) 533; Convention (VII) relating to the Conversion of Merchant Ships into War-Ships, signed at The Hague, 18 October 1907, 3 Martens Nouveau Recueil (3d) 557; Convention (VIII) relative to the Laying of Automatic Submarine Contact Mines, signed at The Hague, 18 October 1907, 3 Martens Nouveau Recueil (3d) 580, 36 Stat. 2332, T.S. No. 541; Convention (IX) concerning Bombardment by Naval Forces in Time of War, signed at The Hague, 18 October 1907, 3 Martens Nouveau Recueil (3d) 604, 36 Stat. 2351, T.S. No. 542; Convention (X) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 6 July 1907, signed at The Hague, 18 October 1907, 3 Martens Nouveau Recueil (3d) 630, 36 Stat. 2371, T.S. No. 543; Convention (XI) relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War, signed at The Hague 18 October 1907, 3 Martens Nouveau Recueil (3d) 663, 36 Stat. 2396, T.S. No. 544; Convention (XII) relative to the Creation of an International Prize Court, signed at The Hague, 18 October 1907, 3 Martens Nouveau Recueil (3d) 688; Convention (XIII) concerning the Rights and Duties of Neutral Powers in Naval War, signed at The Hague 18 October 1907, 3 Martens

Nouveau Recueil (3d) 713, 36 Stat. 2415, T.S. No. 545;  
 Declaration (XIV) Prohibiting the Discharge of Projectiles and  
 Explosives from Balloons, signed at The Hague, 18 October  
 1907, 3 Martens Nouveau Recueil (3d) 745, 36 Stat. 2439, T.S.  
 No. 546.

314. See, e.g., Veuthey, "Some Problems of Humanitarian  
 Law in Non-International Conflicts and Guerrilla Warfare," in  
 1 Bassiouni & Nanda, International Criminal Law, supra note  
 12, at 422; Veuthey, "Les Conflits Armes de Caractere Non  
 International et le Droit Humanitaire," in Current Problems of  
 International Law 179 (E. Cassese ed. 1975).

315. Id. On the "relative political offense" exception  
 generally, see Van den Wijngaert, The Political Offence Excep-  
 tion, supra note 39, at 108-11.

316. See Senate Foreign Relations Hearings on S. 1940,  
supra note 20.

317. See House Judiciary Hearings on H.R. 5227, supra  
 note 4, at 49 (testimony of D. Carliner, International Human  
 Rights Law Group); id. at 64 (testimony of R. Falk, Princeton  
 University School of Law); id. at 71 (testimony of W. Hender-  
 son, ACLU); id. at 85 (testimony of W. Goodman, Topel & Good-  
 man); id. at 98 (testimony of M. C. Bassiouni, DePaul Univer-  
 sity College of Law); id. at 108 (testimony of S. Lubet,  
 Northwestern University School of Law); id. at 141 (testimony  
 of K. O'Dempsey, Brehon Law Society, R. Capulong, Alliance for  
 Philippine Concerns); id. at 209 (prepared statement of C.



Pyle, Mount Holyoke College); House Foreign Affairs Hearings on H.R. 6046, supra note 26.

318. See Senate Judiciary Hearings on S. 1639, supra note 3, at 2, 4, 8, 14 (testimony of M. Abbell, Dep't of Justice; D. McGovern, Dep't of State); Senate Foreign Relations Hearings on S. 1940, supra note 19; House Judiciary Hearings on H.R. 5227, supra note 4, at 26-27 (testimony of R. Olsen and M. Abbell, Dep't of Justice); id. at 32 (testimony of D. McGovern, Dep't of State).

319. See Senate Judiciary Hearings on S. 1639, supra note 3, at 30 (testimony of William J. Hannay).

320. See supra note 300.

321. See House Judiciary Report on H.R. 6046, supra note 22, at 23-27.

322. See 1 Bassiouni, U.S. International Extradition, supra note 12, at Chap. VII, § 5, p. 24.

323. The House bill contains such a defense implicitly, in that it bars new requests for the "same factual allegation as a previous complaint." See H.R. 2643, supra note 8, § 3192(a)(2); H.R. 6046, supra note 5, § 3192(a)(2); H.R. 5227, supra note 2, § 3192(a)(2). This "defense" is severely weakened, however, by the bill's provision that the Attorney General may nonetheless file such a complaint upon a showing of "good cause."

324. See M.C. Bassiouni, International Extradition and World Public Order 452-59 (1974), relied upon on this issue in Sindona v. Grant, 619 F.2d 167, 177-78 (2d Cir. 1980). See

also 2 Bassiouni, U.S. International Extradition, supra note 12, at Chap. VIII, § 4, pp. 4-12.

325. See, e.g., International Covenant on Civil and Political Rights, 16 December 1966, G.A. Res. 2200A, 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316, Art. 14(7); American Convention on Human Rights, 22 November 1969, O.A.S. Off. Rec. OEA/Ser. U/XVI/1.1, Doc. 65, Rev. 1, Corr. 1, Art. 8(4). See also Bassiouni, Hertzberg, Zammutto, "The Protection of Human Rights under International Instruments and National Constitutions," 4 Nouvelles Etudes Penales 57, 84 (IAPL, 1982).

326. See Santobello v. New York, 404 U.S. 257 (1971); Geisser v. United States, 513 F.2d 862 (5th Cir. 1975), on remand Petition of Geisser, 414 F. Supp. 49 (S.D. Fla. 1976), vacated on other grounds Petition of Geisser, 554 F.2d 698 (5th Cir. 1977); United States v. Pihakis, 545 F.2d 973 (5th Cir. 1977); Scrivens v. Henderson, 525 F.2d 1263 (5th Cir.), cert. denied, 429 U.S. 919 (1976); Dugan v. United States, 521 F.2d 231 (5th Cir. 1973).

327. See House Judiciary Report on H.R. 6046, supra note 20, at 19.

328. See S. 220, supra note 7, § 3192(d)(1); S. 1940, supra note 5, § 3192(d)(1); S. 1639, supra note 1, § 3192(d)(1).

329. See H.R. 2643, supra note 8, § 3192(d)(2); H.R. 6046, supra note 5, § 3192(d)(2). See supra notes 169-84 and accompanying text regarding bail.

330. 18 U.S.C. § 3184 (1976) requires only that the court certify its findings and a copy of the transcript to the Secretary of State.

331. See S. 220, supra note 7, § 3194(f); S. 1940, supra note 5, § 3194(f); S. 1639, supra note 1, § 3194(f); H.R. 2643, supra note 8, § 3194(f); H.R. 6046, supra note 5, § 3194(f); H.R. 5227, supra note 2, § 3194(f).

332. The provision regarding appeal, Section 3195, is discussed at notes 339-74 and accompanying text infra.

333. See S. 220, supra note 7, § 3194(f)(1); S. 1940, supra note 5, § 3194(f)(1); S. 1639, supra note 1, § 3194(f)(1); H.R. 2643, supra note 8, § 3194(f)(1); H.R. 6046, supra note 5, § 3194(f)(1); H.R. 5227, supra note 2, § 3194(f)(1).

334. See S. 220, supra note 7, § 3194(e)(2); S. 1940, supra note 5, § 3194(e)(2); S. 1639, supra note 1, § 3194(e)(2).

335. See H.R. 2643, supra note 8, § 3194(f)(2) H.R. 6046, supra note 5, § 3194(f)(2).

336. H.R. 2643, supra note 8, § 3194(i); H.R. 6046, supra note 5, § 3194(i); H.R. 5227, supra note 2, § 3194(i).

337. Id.

338. S. 220, supra note 7, § 3196(c); S. 1940, supra note 5, § 3196(c); S. 1639, supra note 1, § 3196(c).

339. S. 220, supra note 7, § 3195, S. 1940, supra note 5, § 3195; S. 1639, supra note 1, § 3195; H.R. 2643, supra

note 8, § 3195; H.R. 6046, supra note 5, § 3195; H.R. 5227, supra note 2, § 3195.

340. U.S. Const. art. I, § 9, cl. 2: "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in cases of Rebellion or Invasion the public Safety may require it." See also House Judiciary Report on H.R. 6046, supra note 23, at 29.

341. See Senate Judiciary Report, supra note 15, at 17-19; House Judiciary Report, supra note 23, at 28-29.

342. See Matter of Mackin, 668 F.2d 122 (2d Cir. 1981). See also Senate Judiciary Report on S. 1940, supra note 15, at 17-19.

343. S. 220, supra note 7, § 3195(a); S. 1940, supra note 5, § 3195(a); S. 1639, supra note 1, § 3195(a) state:

IN GENERAL.--Either party may appeal, to the appropriate United States court of appeals, the findings by the district court on a complaint for extradition. The appeal shall be taken in the manner prescribed by rules 3 and 4(b) of the Federal Rules of Appellate Procedure, and shall be heard as soon as practicable after the filing of the notice of appeal. Pending determination of the appeal, the district court shall stay the extradition of a person found extraditable.

Rules 3 and 4(b) provide:

#### Rule 3.

##### APPEAL AS OF RIGHT--HOW TAKEN

(a) Filing the Notice of Appeal. An appeal permitted by law as of right from a district court to a court of appeals shall be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but

is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal. Appeals by permission under 28 U.S.C. § 1292(b) and appeals by allowance in bankruptcy shall be taken in the manner prescribed by Rule 5 and Rule 6, respectively.

(b) Joint or Consolidated Appeals.

If two or more persons are entitled to appeal from a judgment or order of district court and their interests are such as to make joinder practicable, they may file a joint notice of appeal, or may join in appeal after filing separate timely notices of appeal, and they thereafter proceed on appeal as a single appellant. Appeals may be consolidated by order of the court of appeals upon its own motion or upon motion of a party, or by stipulation of the parties to the several appeals.

(c) Content of the Notice of Appeal.

The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. Form 1 in the Appendix of Forms is a suggested form of a notice of appeal.

(d) Service of the Notice of Appeal.

The clerk of the district court shall serve notice of the filing of a notice of appeal by mailing a copy thereof to counsel of record of each party other than the appellant, or, if a party is not represented by counsel, to the party at his last known address; and in criminal cases, habeas corpus proceedings, or proceedings under 28 U.S.C. § 2255, the clerk shall mail a copy of the notice of appeal and of the docket entries to the clerk of the court of appeals named in the notice. When an appeal is taken by a defendant in a criminal case, the clerk shall also serve a copy of the notice of appeal upon him, either by personal service or by mail addressed to him. The clerk shall note on each copy served the date on which the notice of appeal was filed. Failure of the clerk to serve notice shall not affect the validity of the appeal. Service shall



be sufficient notwithstanding the death of a party or his counsel. The clerk shall note in the docket the names of the parties to whom he mails copies, with the date of mailing.

Rule 4  
APPEAL AS OF RIGHT--WHEN TAKEN

. . .

(b) Appeals in Criminal Cases. In a criminal case the notice of appeal by a defendant shall be filed in the district court within 10 days after the entry of the judgment or order appealed from. A notice of appeal filed after the announcement of a decision, sentence or order but before entry of the judgment or order shall be treated as filed after each entry and on the day thereof. If a timely motion in arrest of judgment or for a new trial on any ground other than newly discovered evidence has been made, an appeal from a judgment of conviction may be taken within 10 days after the entry of an order denying the motion. A motion for a new trial based on the ground of newly discovered evidence will similarly extend the time for appeal from a judgment of conviction if the motion is made before or within 10 days after entry of the judgment. When an appeal by the government is authorized by statute, the notice of appeal shall be filed in the district court within 30 days after the entry of the judgment or order appealed from. A judgment or order is entered within the meaning of this subdivision when it is entered in the criminal docket. Upon a showing of excusable neglect the district court may, before or after the time has expired, with or without motion and notice, extend the time for filing a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision.

The Senate Judiciary Committee noted in its Report that other federal rules of appellate procedure should also apply to

matters such as briefing, oral argument, etc. See Senate Judiciary Report on S. 1940, supra note 15, at 18.

344. See H.R. 2643, supra note 8, § 3195(a)(1); H.R. 6046, supra note 5, § 3195(a)(1); H.R. 5227, supra note 2, § 3195(a)(1). The House Judiciary Committee made no further specification of which rules should apply. See House Judiciary Report on H.R. 6046, supra note 23, at 28.

345. See notes 215 and 216 supra.

346. See S. 220, supra note 7, § 3195(a); S. 1940, supra note 5, § 3195(a); S. 1639, supra note 1, § 3195(a); H.R. 2643, supra note 8, § 3195(a)(2); H.R. 6046, supra note 5, § 3195(a)(2); H.R. 5227, supra note 2, § 3195(a)(2).

347. Id.

348. H.R. 2643, supra note 8, § 3195(a)(4); H.R. 6046, supra note 5, § 3195(a)(4); H.R. 5227, supra note 2, § 3195(a)(4).

349. See Senate Judiciary Report on S. 1940, supra note 15, at 19; House Judiciary Report on H.R. 6046, supra note 23, at 29.

350. See S. 220, supra note 7, § 3195(b); S. 1940, supra note 5, § 3195(b); S. 1639, supra note 1, § 3195(b); H.R. 2643, supra note 8, § 3195(a)(3); H.R. 6046, supra note 5, § 3195(a)(3); H.R. 5227, supra note 2, § 3195(a)(3).

351. S. 220, supra note 7, § 3195(b)(1); S. 1940, supra note 5, § 3195(b)(1); S. 1639, supra note 1, § 3195(b)(1); H.R. 2643, supra note 8, § 3195(a)(3)(A); H.R. 6046, supra note 5, § 3195(a)(3)(A).

352. S. 220, supra note 7, § 3195(b)(2); S. 1940, supra note 5, § 3195(b)(2); S. 1639, supra note 1, § 3195(b)(2); H.R. 2643, supra note 8, § 3195(a)(3)(B); H.R. 6046, supra note 5, § 3195(a)(3)(B); H.R. 5227, supra note 2, § 3195(a)(3)(B).

353. S. 220, supra note 7, § 3195(b)(1); S. 1940, supra note 5, § 3195(b)(1); S. 1639, supra note 1, § 3195(b)(1).

The Senate Judiciary Report stressed its desire that

this authority to release a fugitive on bail will be utilized even more sparingly than the power to grant bail before the extradition hearing, and only after the most thorough and searching examination of the claimed need for release. It is expected that the courts of appeal will keep in mind that "no amount of money could answer the damage that would be sustained by the United States if [the fugitive] were to be released on bond, flee the jurisdiction, and be unavailable to surrender. . . ."

Senate Judiciary Report on S. 1940, supra note 15, at 18-19, quoting *Jimenez v. Aristequieta*, 314 F.2d 649 (5th Cir. 1963). Although the Report does not cite to the particular page on which the quoted material appears in *Jimenez*, it can be found on page 653 of the court's opinion. The original House bill, H.R. 5227, simply stated that the relator should be held pending appeal if the Attorney General, upon motion, proved that the relator presented a risk of flight or posed a danger on appeal, and that the problem of success in appeal was great. See H.R. 5227, supra note 2, § 3195(a)(3). The provision did not place upon the relator any burden of proving that release was appropriate.

354. H.R. 2643, supra note 8, § 3195(a)(3)(A); H.R. 6046, supra note 5, § 3195(a)(3)(A).

355. S. 220, supra note 7, § 3195(b)(2); S. 1940, supra note 5, § 3195(b)(2); S. 1639, supra note 1, § 3195(b)(2).

356. S. 220, supra note 7, § 3195(b)(2); S. 1940, supra note 5, § 3195(b)(2); S. 1639, supra note 1, § 3195(b)(2).

357. H.R. 2643, supra note 8, § 3195(a)(3)(B); H.R. 6046, supra note 5, § 3195(a)(3)(B).

358. See S. 220, supra note 7, § 3195(a); S. 1940, supra note 5, § 3195(a); S. 1639, supra note 1, § 3195(a); H.R. 2643, supra note 8, § 3195(a)(1); H.R. 6046, supra note 5, § 3195(a)(1); H.R. 5227, supra note 2, § 3195(a)(1). In addition, both bills provide that the district court shall stay its order pending the appeal. S. 220, supra note 7, § 3195(a); S. 1940, supra note 5, § 3195(a); S. 1639, supra note 1, § 3195(a); H.R. 2643, supra note 8, § 3195(a)(2); H.R. 6046, supra note 5, § 3195(a)(2); H.R. 5227, supra note 2, § 3195(a)(2).

359. *Fernandez v. Phillips*, 268 U.S. 311, 312 (1925); *Valencia v. Limbs*, 655 F.2d 195, 197 (9th Cir. 1981); *Antones v. Vance*, 640 F.2d 3, 4-5 (4th Cir. 1981); *Matter of Assarsson*, 635 F.2d 1237, 1240-41 (7th Cir. 1980).

360. *Fernandez v. Phillips*, 268 U.S. at 312. The phrase "finding of probable cause," although commonly used, is misleading since the existence of probable cause is not a finding of fact, but rather a legal judgment which is made based upon

certain facts which are found or allegations which are accepted as true.

361. *Spinelli v. United States*, 393 U.S. 410, 419 (1969).

362. See, e.g., *Fernandez v. Phillips*, 268 U.S. 311, 312 (1925); *Valencia v. Limbs*, 655 F.2d 195, 197 (9th Cir. 1981); *Antones v. Vance*, 640 F.2d 3, 4-5 (4th Cir. 1981).

363. See, e.g., *Eain v. Wilkes*, 641 F.2d 504, 507-508 (7th Cir.), cert. denied, 454 U.S. 894 (1981); *Antones v. Vance*, 640 F.2d 3, 4-5 (4th Cir. 1981); *Escobedo v. United States*, 623 F.2d 1098, 1102 (5th Cir. 1980); *Brauche v. Raiche*, 618 F.2d 843, 854 (1st Cir. 1980); *Hooker v. Klein*, 573 F.2d 1360, 1367, 1369 (9th Cir. 1978); *Jhirad v. Ferrandina*, 536 F.2d 478, 485 (2d Cir. 1976).

364. See generally *Fed. R. App. P.* 3, 4(b) (standards and notice of appeal); *Fed. R. Crim. P.* 52 (harmless error and plain error); *Fed. R. Civ. P.* 15 (findings by district court will not be set aside unless clearly erroneous).

365. *S. 220*, supra note 7, § 3195(c); *S. 1940*, supra note 5, § 3195(c); *S. 1639*, supra note 1, § 3195(c); *H.R. 2643*, supra note 8, § 3195(b)(2); *H.R. 6046*, supra note 5, § 3195(b)(2); *H.R. 5227*, supra note 2, § 3195(b)(2).

366. See notes 362-64 supra.

367. *H.R. 2643*, supra note 8, § 3195(b)(2); *H.R. 6046*, supra note 5, § 3195(b)(2); *H.R. 5227*, supra note 2, § 3195(b)(2).



368. The House Judiciary Committee offered no specification in this regard. See House Judiciary Report on H.R. 6046, supra note 23, at 29. Given the Committee's numerous references to criminal jurisprudence and legislation in other sections where clarification was offered, it is likely the Committee intended such an analogy.

369. On the necessity of probable cause to arrest prior to the extradition hearing, see supra notes 151-68 and accompanying text.

370. See e.g., Fed. R. Crim. P. 33 (after trial by court without jury, upon motion of defendant, district court may vacate judgment, hear additional evidence, and enter new judgment); Rule 34 (motion in arrest of judgment to contest jurisdiction); Rule 36 (motion to correct clerical mistake).

371. Neither the Senate nor House Judiciary Report considered the question.

372. See notes 215 and 216 supra.

373. "That which is explicitly stated excludes anything else by implication." For the application of this rule in the interpretation of extradition treaties, see 1 Bassiouni, U.S. International Extradition, supra note 12, at Chap. II, § 4, pp. 25-26.

374. This section is discussed at note 421 and accompanying text infra.

375. Current legislation contains no provision for executive discretion to deny extradition. Such discretion is

currently derived from the executive's constitutional authority to direct foreign affairs, in Article 2, section 2.

376. S. 220, supra note 7, § 3196(a)(3)(A); S. 1940, supra note 5, § 3194(g)(i); S. 1639, supra note 1, § 3196(a); H.R. 2643, supra note 8, § 3194(e)(4)(A); H.R. 6046, supra note 5, § 3194(e)(3)(A); H.R. 5227, supra note 2, § 3194(e)(1)(A). The earlier Senate bill included this provision in its section regarding the hearing rather than its section regarding surrender.

377. S. 220, supra note 7, § 3196(a)(3)(B); S. 1940, supra note 5, § 3194(g)(2); S. 1639, supra note 1, § 3194(a); H.R. 2643, § 3194(e)(4)(B); H.R. 6046, supra note 5, § 3194(e)(3)(B); H.R. 5227, supra note 2, § 3194(e)(3)(B). The Senate version also required that in determining these issues the Secretary of State consult with the Department of State, including the Bureau of Human Rights and Humanitarian Affairs. S. 220, supra note 7, § 3196(a); S. 1940, supra note 5, § 3194(g)(3). The earlier Senate version provided for these matters in its section regarding the hearing rather than its section regarding surrender. See S. 1940, supra note 5, § 3194(g)(3).

378. U.S. Const. art. 2, § 2.

379. See 1 Bassiouni, U.S. International Extradition, supra note 12, at Chap. VII, § 7.

380. S. 220, supra note 7, § 3196(a)(1); S. 1940, supra note 5, § 3194(g)(1); S. 1639, supra note 1, § 3194(a); H.R.

2643, supra note 8, § 3194(a)(4)(A); H.R. 6046, supra note 5, § 3194(e)(3)(A); H.R. 5227, supra note 2, § 3194(3)(1)(A).

381. 5 U.S.C. §§ 701 et seq. (1976). The Senate bill states that the Secretary's decision is "a matter solely within the discretion of the Secretary and is not subject to judicial review." S. 220, supra note 7, § 3196(a). The previous Senate version differed slightly, in that it provided that the Secretary's decision is "final" rather than "a matter solely within the discretion of the Secretary." See S. 1940, supra note 5, § 3194(g)(1). The House bill contains no explicit provision for the finality and reviewability of the Secretary's discretion.

382. Protocol Relating to the Status of Refugees, entered into force, 1 Nov. 1968, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267.

383. 8 U.S.C. § 1101. For an in-depth study, see Trans-national Legal Problems of Refugees (1982 Michigan Yearbook of Int'l Legal Studies).

384. The Refugee Act provides the following definition of "refugee":

any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

Pub. L. No. 96-212, Title II, § 201(a), codified at 8 U.S.C. § 1101(a)(42)(A).

385. Pub. L. No. 96-212, Title II, §§ 208 (asylum), 209 (adjustment of status), codified at 8 U.S.C. §§ 1158, 1159. See 8 C.F.R. § 208.10 (procedures for review). The Act specifically states that

the Attorney General shall not deport any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

Id. § 203(e), codified at 8 U.S.C. § 1253(h) [emphasis added].

386. See note 379 supra.

387. See M.C. Bassiouni, International Extradition and World Public Order 531-34 (1974). These observations were made by this writer at hearings on S. 1639, H.R. 5227, and H.R. 6046. See Senate Judiciary Hearings on S. 1639, supra note 3, at 20; House Judiciary Hearings on H.R. 5227, supra note 4, at 105-106; House Foreign Affairs Hearings on H.R. 6046, supra note 27.

388. See S. 220, supra note 7, § 3196(a)(3)(B); S. 1940, supra note 5, § 3194(g)(2); S. 1639, supra note 1, § 3194(a); H.R. 2643, supra note 8, § 3194(e)(4)(B); H.R. 6046, supra note 5, § 3194(e)(3)(B); H.R. 5227, supra note 2, § 3194(e)(1)(B).

389. See 1 Bassiouni, U.S. International Extradition, supra note 12, at Chap. VII, § 7. See also Neely v. Henkel, 180 U.S. 109 (1901); Argento v. Horn, 241 F.2d 258 (6th Cir.

1957). But see *Gallina v. Fraser*, 278 F.2d 77 (2d Cir. 1960); *Holmes v. Laird*, 459 F.2d 1211 (D.C. Cir. 1972); U.S. ex rel. *Bloomfield v. Gengler*, 507 F.2d 925 (2d Cir. 1974); *Peroff v. Hylton*, 563 F.2d 1099 (4th Cir. 1977) (rule of non-inquiry may be relaxed in compelling circumstances). The House Judiciary Report noted that the rule of non-inquiry is "not absolute," and may be relaxed in particularly egregious situations. In support, the Report referred to *Gallina v. Fraser*. See House Judiciary Report on H.R. 6046, supra note 23, at 20.

390. Universal Declaration of Human Rights, G.A. Res. 217 (III), U.N. Doc. A/810 at 71, 11 December 1948, article 5; International Covenant on Civil and Political Rights, entered into force, 23 March 1976, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16), 52, U.N. Doc. A/6316, article 7; European Convention for the Protection of Human Rights and Fundamental Freedoms, entered into force, 3 September 1953, 213 U.N.T.S. 222, article 3; American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by The Ninth International Conference of American States (30 March - 2 May 1948), O.A.S. Off. Rec. OEA/Ser. L/V/I.4 Rev. (1965), article XXVIII; American Convention on Human Rights, opened for signature, 22 November 1969, O.A.S. Off. Rec. OEA/Ser. K/XVI/1.1, Doc. 65, Rev. 1, Corr. 1, article 5.

391. See *House Foreign Affairs Hearings on H.R. 6046*, supra note 27. See also *Senate Judiciary Hearings on S. 1639*, supra note 3, at 21 (testimony of M. Cherif Bassiouni); House



Judiciary Hearings on H.R. 5227, supra note 4, at 100, 104-105 (testimony of M. Cherif Bassiouni).

392. See 2 Bassiouni, U.S. International Extradition, supra note 12, at Chap. VIII, § 5.

393. See 18 U.S.C. §§ 4107-4108 (1976). The inclusion of a provision regarding conditional surrender was suggested by this writer at hearings before the Senate Judiciary Committee on S. 1639. See Senate Judiciary Hearings on S. 1639, supra note 3, at 20 (testimony of M. Cherif Bassiouni). The provision was added by the Senate Judiciary Committee to S. 1940 and S. 220 and was carried over in H.R. 5227 and H.R. 6046. See S. 220, supra note 7, § 3196(a)(2); S. 1940, supra note 5, § 3196(a)(2); H.R. 2643, supra note 8, § 3196(a); H.R. 6046, supra note 5, § 3196(a).

394. See supra notes 388-90 and accompanying text.

395. See S. 220, supra note 7, § 3196; S. 1940, supra note 5, § 3196; H.R. 2643, supra note 8, § 3196; H.R. 6046, supra note 5, § 3196.

396. S. 220, supra note 7, § 3196(a); S. 1940, supra note 5, § 3196(a); S. 1639, supra note 1, § 3196(a); H.R. 2643, supra note 8, § 3196(a); H.R. 6046, supra note 5, § 3196(a); H.R. 5227, supra note 2, § 3196(a).

397. S. 220, supra note 7, § 3196(a); S. 1940, supra note 5, § 3196(a); S. 1639, supra note 1, § 3196(a); H.R. 2643, supra note 8, § 3196(a); H.R. 6046, supra note 5, § 3196(a); H.R. 5227, supra note 2, § 3196(a).

398. S. 220, supra note 7, § 3196(b); S. 1940, supra note 5, § 3196(b); S. 1639, supra note 1, § 3196(b); H.R. 2643, supra note 8, § 3196(b); H.R. 6046, supra note 5, § 3196(b); H.R. 5227, supra note 2, § 3196(b). The Secretary of State must also notify the requesting state of the time limitations for removal if the Secretary has determined that extradition is appropriate.

399. H.R. 2643, supra note 8, § 3196(b); H.R. 6046, supra note 5, § 3196(b); H.R. 5227, supra note 2, § 3196(b). The Senate makes no specification of who is to perform the surrender.

400. S. 220, supra note 7, § 3196(c)(1); S. 1940, supra note 5, § 3196(c)(1); S. 1639, supra note 1, § 3196(c)(1).

401. S. 220, supra note 7, § 3196(c)(2); S. 1940, supra note 5, § 3196(c)(2); S. 1639, supra note 1, § 3196(c)(2).

402. S. 220, supra note 7, § 3196(c); S. 1940, supra note 5, § 3196(c); S. 1639, supra note 1, § 3196(c).

403. S. 220, supra note 7, § 3196(c); S. 1940, supra note 5, § 3196(c); S. 1639, supra note 1, § 3196(c).

404. H.R. 2643, supra note 8, § 3194(i); H.R. 6046, supra note 5, § 3194(i); H.R. 5227, supra note 2, § 3194(i).

405. H.R. 2643, supra note 8, § 3196(c)(1); H.R. 6046, supra note 5, § 3196(c)(1). In addition, however, it further requires that surrender be performed within thirty days from the court's certification of its transcript if the relator has waived the extradition hearing. H.R. 2643, supra note 8, § 3196(c)(2); H.R. 6046, supra note 5, § 3196(c)(2). The

original House bill, H.R. 5227, contained no limitation on the relator's removal in either situation.

406. H.R. 2643, supra note 8, §§ 3194(i), 3196(c); H.R. 6046, supra note 5, §§ 3194(i), 3196(c); H.R. 5227, supra note 2, § 3194(i).

407. H.R. 2643, supra note 8, §§ 3194(i), 3196(c); H.R. 6046, supra note 5, §§ 3194(i), 3196(c); H.R. 5227, supra note 2, § 3194(i).

408. H.R. 2643, supra note 8, §§ 3194(i), 3196(c); H.R. 6046, supra note 5, §§ 3194(i), 3196(c); H.R. 5227, supra note 2, § 3194(i)

409. The House bill provides

The United States may cooperate in the transit through the territory of the United States of a person in custody for extradition from one foreign state to another foreign state. The Attorney General may hold such person in custody for not more than ten days until arrangements are made for the continuation of such person's transit.

H.R. 2643, supra note 8, § 3197; H.R. 6046, supra note 5, § 3197. There is no equivalent provision in H.R. 5227.

410. A recommendation that the new legislation contain a provision for transit extradition was made by this writer before the Senate and House Judiciary Committee Hearings on the proposed Act. See Senate Judiciary Hearings on S. 1639, supra note 3, at 20; House Judiciary Hearings on H.R. 5227, supra note 4, at 106.

411. See note 410 supra.

412. At the least, the provision would violate the fourth amendment of the U.S. Constitution requiring probable cause for an arrest.

413. See S. 220, supra note 7, § 3197; S. 1940, supra note 5, § 3197; S. 1639, supra note 1, § 3197; H.R. 2643, supra note 8, § 3198; H.R. 6046, supra note 5, § 3198; H.R. 5227, supra note 2, § 3197.

414. S. 220, supra note 7, § 3197(a); S. 1940, supra note 5, § 3197(a); S. 1639, supra note 1, § 3197(a); H.R. 2643, supra note 8, § 3198(a); H.R. 6046, supra note 5, § 3198(a); H.R. 5227, supra note 2, § 3198(a). Under current practice, it is the Secretary of State rather than the Attorney General who has the authority to appoint agents. See 18 U.S.C. § 3192 (1976); Exec. Order No. 22517, 35 Fed. Reg. 4937 (1970), reprinted in 1970 U.S.C.A.A.N. 6232.

415. The Senate and House Judiciary Reports, in their commentaries on this section, refer to the process of extradition, but do not specifically limit the authority to such process. See Senate Judiciary Report on S. 1940, supra note 15, at 23-24; House Judiciary Report on H.R. 6046, supra note 23, at 33.

416. This procedure is now statutorily regulated at 18 U.S.C. §§ 4107-4108 (1976).

417. See Bassiouni, "International Procedures for the Apprehension and Rendition of Fugitive Offenders," 74 Proc. Am. Soc'y Int'l L. 273 (1980).

418. See H.R. 2643, supra note 8, §§ 3194(i), 3196(c); H.R. 6046, supra note 5, §§ 3194(c), 3196(c); H.R. 5227, supra note 2, § 3194(c).

419. See H.R. 2643, supra note 8, §§ 3194(i), 3196(c); H.R. 6046, supra note 5, §§ 3194(c), 3196(c); H.R. 5227, supra note 2, § 3194(i).

420. See notes 239-44 and accompanying text supra

421. The bill states:

The Supreme Court of the United States shall prescribe, from time to time, rules of practice and procedure with respect to any or all proceedings under this chapter. The Supreme Court may fix the dates when such rules shall take effect, except that such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of one hundred and eighty days after they have been thus reported.

H.R. 2643, supra note 8, § 3199(f); H.R. 6046, supra note 5, § 3199(f); H.R. 5227, supra note 2, § 3198(f).

422. S. 220, supra note 7, § 3198(b); S. 1940, supra note 5, § 3198(b); S. 1639, supra note 1, § 3198(b); H.R. 2643, supra note 8, § 3199(e); H.R. 6046, supra note 5, § 3199(e); H.R. 5227, supra note 2, § 3198(e).

423. S. 220, supra note 7, § 3198(b); S. 1940, supra note 5, § 3198(b); S. 1639, supra note 1, § 3198(b); H.R. 2643, supra note 8, § 3199(e); H.R. 6046, supra note 5, § 3199(e); H.R. 5227, supra note 2, § 3198(e).

424. 5 U.S.C. §§ 701 et seq. (1976).

425. See S. 220, supra note 7, § 3196(a)(3)(B); S. 1940, supra note 5, § 3194(g)(2); S. 1639, supra note 1, § 3194(a); H.R. 2643, supra note 8, § 3194(e)(4)(B); H.R. 6046, supra note 5, § 3194(e)(3)(B); H.R. 5227, supra note 2, § 3194(e)(1)(B). This section of the "Act" is discussed at notes 375-94 and accompanying text supra.

426. See generally 2 Bassiouni, U.S. International Extradition, supra note 12, at Chap. IX.

427. See Neely v. Henkel, 180 U.S. 109 (1901). The "rule of non-inquiry" is brought into sharp focus in the line of cases dealing with convictions in absentia. In such cases, the United States follows the general practice in international law that convictions in absentia are not conclusive to the individual's guilt but are regarded as equivalent to indictments or formal charges against the individual sought to be extradited. A careful reading of the decisions applying the rule of non-inquiry in such cases reveals that while the courts prefer not to inquire into the treatment to be received by the relator upon surrender or the quality of justice he or she is expected to receive, there is nonetheless in some instances a finding of nonextraditability on "other grounds." See Ex parte Fudera, 162 F. 591 (S.D.N.Y. 1908); Ex parte LaMantia, 206 F. 330 (S.D.N.Y. 1918); In re Mylones, 187 F. Supp. 716 (N.D. Ala. 1960). See also Argento v. Horn, 241 F.2d 258 (6th Cir. 1957).

428. Holmes v. Laird, 459 F.2d 1211 (D.C. Cir. 1972); Gallina v. Fraser, 278 F.2d 77 (2d Cir. 1960). A requesting



state's internal procedures will only be examined when they are antithetical to the federal court's sense of decency. U.S. ex rel. Bloomfield v. Gengler, 507 F.2d 925 (2d Cir. 1974).

429. See Gallina v. Fraser, 278 F.2d 77, 78-79 (2d Cir. 1960); Rosado v. Civiletti, 621 F.2d 1179 (2d Cir. 1980); Escobedo v. United States, 621 F.2d 1098 (5th Cir. 1980).

430. G.A. Res. 217 A (III).

431. G.A. Res. 2200 A, 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316.

432. O.A.S. Official Records Ser. K/XVI/1.1, Doc. 65, Rev. 1, Corr. 1, 7 January 1970.

433. The Draft Convention for the Prevention and Suppression of Torture, 1 February 1978, U.N. Doc. E/CN.4/NGO 213, now under U.N. consideration. See also Bassiouni & Derby, "An Appraisal of Torture in International Law and Practice: The Need for an International Convention for the Prevention and Suppression of Torture," 48 Rev. Int'le de Droit Penal 23 (1977).

434. See notes 379-87 and accompanying text supra.

435. These observations and suggestions were also made by this writer at congressional hearings in various versions of the "Act." See Senate Judiciary Hearings on S. 1639, supra note 3, at 21; House Judiciary Hearings on H.R. 5227, supra note 4, at 100, 104-105; House Foreign Affairs Hearings on H.R. 6046, supra note 27.

436. See Treaty Between the United States and Mexico, entered into force, 25 January 1980, \_\_\_ U.S.T. \_\_\_, T.I.A.S. No. 9656, art. 17; Treaty Between the United States and the Federal Republic of Germany, entered into force, 29 August 1980, \_\_\_ U.S.T. \_\_\_, T.I.A.S. No. 9785, art. 32. See also Cosgrove v. Winney, 174 U.S. 64 (1899); Johnson v. Brown, 205 U.S. 309 (1907); Greene v. United States, 154 F.2d 401 (5th Cir. 1907); Collins v. O'Neil, 214 U.S. 113 (1909); United States v. Paroutian, 299 F.2d 486 (2d Cir. 1962); Fioconci v. United States, 464 F.2d 475 (2d Cir. 1972); Shaprio v. Ferrandina, 478 F.2d 894 (2d Cir.), cert. dismissed, 414 U.S. 884 (1973); McGann v. U.S. Board of Parole, 488 F.2d 39 (1973); United States v. Rossi, 545 F.2d 814 (2d Cir. 1976); United States v. Flores, 538 F.2d 939 (2d Cir. 1976); Freedman v. United States, 437 F. Supp. 1252 (N.D. Ga. 1977); Berenguer v. Vance, 473 F. Supp. 1195 (D.D.C. 1979).

437. See generally 1 Bassiouni, U.S. International Extradition, supra note 12, at Chap. VII, § 6.

438. See S. 220, supra note 7, § 3193; S. 1940, supra note 5, § 3193; S. 1639, supra note 1, § 3193; H.R. 2643, supra note 8, § 3193; H.R. 6046, supra note 5, § 3193; H.R. 5227, supra note 2, § 3193. See also House Judiciary Report on H.R. 6046, supra note 23, at 12. The section regarding waiver is discussed at notes 187-212 supra.

439. The "Act" provides for conditional extradition as part of the Secretary of State's executive discretion. See S. 220, supra note 7, § 3196(a)(3)(B); S. 1940, supra note 5,

§ 3194(g)(2); S. 1639, supra note 1, § 3194(a); H.R. 2643, supra note 8, § 3194(a)(4)(B); H.R. 6046, supra note 5, § 3194(e)(3)(B); H.R. 5227, supra note 2, § 3194(e)(1)(B). It is discussed at notes 338-90 and accompanying text supra, and also discussed with respect to the rule of non-inquiry at notes 424-35 and accompanying text supra.

440. These suggestions were made by this writer at congressional hearings on various versions of the "Act." See Senate Judiciary Hearings on S. 1639, supra note 24, at 20; House Judiciary Hearings on H.R. 5227, supra note 4, at 103; House Foreign Affairs Hearings on H.R. 6046, supra note 27.

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MARCUS S. TOPEL  
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May 2, 1983

Congressman William J. Hughes  
 Chairman  
 Subcommittee on Crime  
 Committee on the Judiciary  
 House of Representatives  
 Washington, D.C. 20515

Re: H.R. 2643, Extradition Act of  
 1983

Dear Congressman Hughes:

Thank you for requesting my comments on H.R. 2643, the Extradition Act of 1983. I would request that this letter be treated as my prepared statement at the subcommittee hearing on Thursday, May 5, 1983.

On the whole, I believe the provisions of H.R. 2643 represent a reasonable attempt to define the scope of the political offense exception in international extradition proceedings. Although I believe that the judiciary has adequately and fairly defined and interpreted the political offense doctrine, I recognize that some statutory definitional language is probably unavoidable. If that is the case, H.R. 2643 provides a structure for the political offense exception which appears to be reasonable and flexible enough to permit the judiciary to discharge its decisionmaking responsibility in that area.

The following observations are keyed to those sections of H.R. 2643 which I believe deserve further comment or modification.

§3192(a)(2): While this provision is not equivalent to a double jeopardy bar, it will discourage judge shopping where the first extradition request is denied and no new facts can be offered in support of a second extradition request. I think this provision is essential to a fair extradition process and is the best method to prevent prosecutorial forum shopping.

§3192(c): This provision sensibly incorporates mandatory venue transfer to the district where the accused is found and eliminates the unfair burden of a District of Columbia forum for persons residing or found elsewhere.

§3192(d)(2): As a practical matter, to obtain release on bail at any time the accused in an extradition proceeding must always make a substantial showing that he is not a flight risk and is not going to endanger another person or the community. Codification of those concepts in §3192(d)(2)(A) and (B) is certainly desirable to ensure that all federal judges and magistrates recognize that the accused may be entitled to immediate bail release. However, I object to §3192(d)(2)(C) as being irrelevant to and unworkable in fair bail release decisionmaking. The accused is rarely, if ever, in a position to offer evidence on the question of jeopardy to foreign state relationships. Furthermore, the wording of that subsection is so vague (i.e., "with respect to a treaty concerning extradition") that there would be substantial confusion about precisely what type of jeopardy to a foreign state relationship is referred to in §3192(d)(2)(C). I urge eliminating subsection (d)(2)(c).

§3192(d)(3): I oppose an extension beyond 10 days of the provisions of §3192(d)(2). Such extensions, which have no maximum limitations, can be abused by overzealous prosecutors.

§3192(e): The 60 day provisional arrest period is appropriate. A shorter provisional arrest period of 30 or 45 days would, in my opinion, not be desirable for either the government or the accused in most cases. I object to the provision for an unlimited number of 15 day extensions, upon a showing of good cause. As a practical matter, virtually any "cause" will be "good" enough for most judges to order such extensions, irrespective of the dilatoriness of the demanding country or the Justice Department in filing the required extradition documents. In my experience, I have never known a situation where the demanding country was unable to have its documents filed with the court within 60 days. In these days of instant communication, the demanding country should not be provided with statutory authority for potentially lengthy extensions which could even go beyond the 90 day provisional arrest period now authorized under 18 U.S.C. §3187.

§3194(d)(1)(C): This provision is somewhat peculiar. There is no question that dual criminality is established if the conduct for which the extradition is sought constitutes an offense under the law of the United States and the demanding country. Incorporation of the reference to the law of the state where the fugitive is found has precedential support in numerous early international extradition decisions which placed far greater emphasis on state law than does modern extradition law. In light of those precedents, inclusion of that provision [(C)(iii)] is not objectionable, although it seems to reintroduce state law concepts that have been largely abandoned in modern federal decisions. I do object to the (C)(ii) provision concerning "the majority of the States". Such a provision strikes me as unreasonably mechanical. I doubt that many magistrates (or, for that matter, many prosecutors) are going to be willing to analyze the law of the fifty states to determine if twenty-six or more states agree on the criminality of particular conduct. If such scrutiny is needed to determine criminality, it strikes me as highly unlikely that the framers of the particular treaty in question (at least on the United States' side) intended that such conduct be a basis for extradition.

If it is the intent of the bill to allow extradition where the present trend in state or federal law is to criminalize the conduct which is the subject of the extradition request, using a mechanical test such as "majority of the States" is unfair to both the government and the accused. For example, is it fair to the government if 25 states (but not 26) criminalize particular conduct? Likewise, is it fair to the accused if 26 states have criminalized particular conduct by statute but most of those states either have not prosecuted under those statutes because the statutes are archaic, or because the statutes have not been interpreted, or have been given conflicting interpretation?

I believe that the magistrates are capable of interpreting the trends in the law to determine if the conduct is viewed as criminal in this country. I would therefore suggest a more flexible provision than (C)(ii) which would allow the courts to interpret trends in the criminal law without being obligated to rule on the basis of numerical majorities.

§3194(d)(2)(A): As I read this section, if the applicable treaty does not specify a statute of limitations defense, the §3194(d)(2)(A) statute of limitations defense will only be measured by the law of the requesting party. In view of the jurisdictional nature of the statute of limitations in all federal criminal cases where a statute of limitations applies, I believe that the five year federal statute of limitations should also be incorporated into this section. I find it unfair to eliminate the bilateral statute of limitations feature from this section when that bilateral feature has almost always been included in the treaties.



§3194(d)(2)(C): I agree that the accused should have to establish a political offense exception claim by a preponderance of evidence.

§3194(e)(1)(A): I do not understand the purpose of this provision. It appears to give either side the opportunity to have the political offense exception issue decided by a district court judge, rather than a magistrate. The provision seems thoroughly unworkable because no statutory grounds are set forth for such a motion, and decision on such a motion by a district court judge is discretionary rather than mandatory. If the intent of the subsection is to permit judge shopping by both the accused and the government, I have no objection. However, I suspect my feelings would not be shared by the district court judges. I also suspect I may be misconstruing the intent of subsection (e)(1)(A).

§3194(e)(2): I am gratified that the bill maintains the jurisdiction of the courts to decide the political offense claim. I think this provision very correctly excludes, without exception, those offenses set forth in (e)(2)(A) thought (C). While I may quarrel with the constitutionality of mandatory extradition, and the concomitant inapplicability of the political offense exception, as incorporated in (e)(2)(D), the statute, as a constitutional matter, must give way to the superior legal force of such treaty provisions.

I read the "extraordinary circumstances" language in §3194(e)(3) as preserving the power of the courts to uphold a claim where acts of violence are involved, and where the other present legal requirements of the political offense exception have been proved.

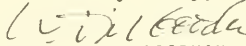
§3195(a)(1): The appeal procedures are a needed and sensible modernization of extradition law for both the accused and the government.

§3199(c)(2): I strongly approve of incorporation of the modified Bail Reform Act provisions in the bill, in place of the unfair "special circumstances" rule which presently is used by some courts in international extradition cases. While I feel that the section goes somewhat overboard in providing the government with opportunities to obtain bail revocation, or otherwise to detain a released party, I believe the intent of the entire section is clearly in favor of bail release for the accused in extradition proceedings, provided that reasonable release conditions are met.

I object to the preponderance of the evidence burden of proof in §3199(c)(10)(B). Once the accused has been released on bail, the government should be required to offer clear and convincing evidence in support of a detention motion under (c)(10)(A).

I look forward to testifying before the Subcommittee on H.R. 2643. As one of the few lawyers in the country who has represented a number of accused persons in international extradition cases, I believe I can offer a practical perspective on the issues involved.

Yours very truly,



WILLIAM M. GOODMAN

# United States District Court

SOUTHERN DISTRICT OF FLORIDA

POST OFFICE BOX 012919

MIAMI, FLORIDA 33101

PETER R. PALERMO  
UNITED STATES MAGISTRATE

May 16, 1983

Congressman William J. Hughes  
Chairman, Subcommittee On Crime  
207 Cannon H.O. Building,  
Washington, D.C. 20515

Attention: Ms. Virginia E. Sloan

Dear Congressman Hughes:

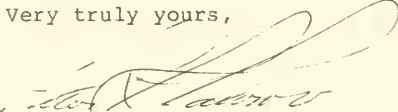
Subject: Bill To Reform The Extradition  
Laws of the United States

As I understand there may have been some confusion in re; my testimony, I shall attempt to clarify my views in this letter.

1. I concur with your views in re; bail should be expanded along the lines set forth in H.R. 2643.
2. The law re; "Rule of Non Inquiry" should basically remain as is set forth in current law.
3. I feel strongly that the courts should have some review of the State Departments findings. This review should be limited and clearly set limits in the law.

It was a pleasure appearing before your committee and hope that I may have aided in your deliberations.

Very truly yours,

---

Peter R. Palermo,  
Chief U. S. Magistrate

PRP/ars

NORTHWESTERN UNIVERSITY  
SCHOOL OF LAW  
357 EAST CHICAGO AVENUE  
CHICAGO, ILLINOIS 60611

May 16, 1983

Ms. Virginia Sloan  
Assistant Counsel  
Subcommittee on Crime  
U.S. House of Representatives  
207 Cannon House Office Building  
Washington, D.C. 20515

Dear Ms. Sloan:

Following our recent telephone conversation, here are my expanded views on the Rule of Non-Inquiry:

Section 3194(e)(4) of H.R. 2643 codifies and somewhat expands the rule of non-inquiry by prohibiting courts of extradition from considering (A) the motive of the requesting government, or (B) whether the extradition is incompatible with humanitarian considerations. This formulation appears to bar courts from denying extradition on the ground that the defendant, if returned, would be subjected to treatment which "shocks the conscience." Some courts previously treated such circumstances as an exception to the rule of non-inquiry. The question which then arises is whether section 3194(e)(4) should be amended or deleted so as to allow the courts to continue to exercise jurisdiction in conscience shocking situations.

Let me begin the discussion of this question by stating two premises: (1) judgments concerning the nature, good faith, and motives of a requesting government are political in nature and ought to be made by the executive; (2) the Secretary of State may be relied upon to refrain from extraditing individuals under "inhumane" circumstances. Thus, consideration by the courts of humanitarian concerns would not appear to be outcome determinative. If prospective treatment shocks the conscience of a judge, it will also shock the conscience of the Secretary of State.

Since the decision may safely be vested in either the executive or the judiciary, it is necessary to examine the merits of each alternative. The executive approach has the advantages of uniformity and discreteness. It would eliminate the risk of conflicting decisions from various courts, and would allow decisions to be made in the most politically discrete manner.

The judicial approach, on the other hand, has the advantage of efficiency. The extradition process, if fully contested, may

take as long as two or three years. It seems ineffecient to the point of foolishness to require a judge to certify extradition under "conscience shocking" circumstances, only to have the Secretary of State deny the request several years later.

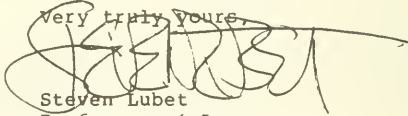
Let me illustrate with an example. Suppose extradition is being sought of an individual who is wanted for the crime of grand theft, and that the punishment he faces is the amputation of a hand. It is safe to assume that neither a federal judge nor the Secretary of State would agree to rendition. Why, then, should we require a full trial, two levels of appeal, and then an executive decision-making process before denying the request. These cases, by definition, are easy and obvious; it makes the most sense to resolve them at the earliest opportunity. Finally, there is no indication from past experience that the courts are likely to abuse or overuse the power to deny extradition pursuant to this exception to the rule of non-inquiry. To paraphrase Congressman Hughes, as he paraphrased many others: If it isn't broken, why fix it?

Political motive cases, of course, are not easy and obvious. Neither can one envision a "motive" case which would shock the conscience. Thus, this aspect of the rule of non-inquiry should be reserved unqualifiedly for the executive.

The final question is how H.R. 2643 ought to deal with the rule of non-inquiry. One solution would be to eliminate section 3194(e)(4) entirely. Presumably, this would leave the law as it now stands. My fear concerning this approach is that it would result in undesired ambiguity concerning political motive cases -- since they might then appear to be justiciable under section 3194(d)(2)(C). There is also a nagging disharmony to the idea of enacting a comprehensive extradition reform act which deals with an important topic only through silence. After all, the problem with the existing law is the lack of statutory guidance. I would suggest, therefore, that the better approach would be to delete only section 3194(e)(4)(B), leaving 3194(e)(4)(A) intact. It would then be clear, assuming appropriate legislative history, that a court could consider humanitarian concerns, but not the question of pretext or motive.

I hope that this brief exposition will be helpful. Please let me know if you have any further questions.

Very truly yours,

  
Steven Lubet  
Professor of Law

SL/ms



THE LAWYERS COMMITTEE  
FOR INTERNATIONAL

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DIRECTOR  
POLITICAL ASYLUM PROJECT

May 23, 1983

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William J. Hughes  
Chairman

Subcommittee on Crime of the  
Committee on the Judiciary  
United States House of Representatives  
Washington, D.C. 20515

Dear Chairman Hughes:

I am concerned that some confusion may have attended the presentations at the hearing held on May 5, 1983, on H.R. 2643, the Extradition Act of 1983. I wish to focus specifically on the comments of Professor Steven Lubet regarding the relationship between the law of international extradition and political asylum.

Contrary to Professor Lubet's suggestion, it is not our contention that a grant of asylum should, without more, protect a person who would otherwise be extradited for the commission of a crime. We do not contend in that regard that one's immigration status, whether it be asylee, permanent resident, or citizen is a basis upon which to withhold extradition.

Rather, our concern is that different standards not be utilized in the extradition context to resolve the political offense issue than those that would be utilized to resolve the very same issue in the context of an application for political asylum. To utilize different substantive standards to resolve the issue, or to have the issue resolved in different fora (i.e., in the Executive as opposed to the Judicial branch), raise the risk that a refugee would be extradited because of different standards, or because the Department of State considers it politically expedient.

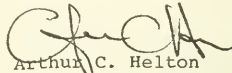
William J. Hughes

The hypothetical posed by Representative McCollum regarding Lech Walesa killing a prison guard and hijacking a plane to the United States in order to effectuate an escape is illustrative. Under the political offense doctrine as codified in the proposed legislation, neither of the offenses (murder or aircraft hijacking) would be considered "political" and bases upon which to defend against extradition. The only remedy would be that of an exercise of unreviewable discretion on the part of the Secretary of State, a remedy which would vary with the politics of the time.

Nor would squaring the standards in the asylum and extradition areas provide undue protection to individuals. Should evidence become available after asylum had been granted which indicates that the asylee had committed a serious non-political offense, asylum could be revoked and extradition sought for the offense in question. 8 CFR Sections 208.8(f) and 208.15(3).

I hope that these supplemental comments will obviate the confusion that I feel developed at the hearing regarding the bill. I would welcome any other questions or inquiries that you may have.

Sincerely,



Arthur C. Helton

ACH/ag



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JUN 16 1983

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 ADNAN S. ABRAHIM

(313) 962-2767

OF COUNSEL  
 LAWRENCE D. HOCHMAN

May 25, 1983

Congressman William J. Hughes  
 Chairman  
 Subcommittee on Crime  
 Committee on the Judiciary  
 House of Representatives  
 Washington, D.C. 20515

RE: H.R. 2643, Extradition Act of 1983

Dear Congressman Hughes:

Thank you for requesting my comments on H.R. 2643, the Extradition Act of 1983. I would request that this letter be treated as my proposed statement in lieu of my testimony at the Subcommittee hearing on Thursday, May 5, 1983.

I join several of my colleagues engaged in the practice of law and have represented persons whose extradition has been sought from the United States in the belief that the American judiciary has, for the most part, sufficiently defined and interpreted the political offense exception to extradition. Mindful of the fact that several cases of international extradition (In re: John McMullen, In re: Ziad Abu Eain and In re: Desmond Mackin), which have involved claims of non-extraditability under the political offense exception clauses of bi-lateral treaties to which the U.S. is a party, have spurred executive and legislative branch interest in the revision of U.S. extradition law, I am prepared to comment on those suggested changes as contained in H.R. 2643, along with other modifications contained therein.

On the political offense exception, I fully support the efforts of exempt therefrom any acts or alleged acts which fall within the scope of multi-lateral conventions to which the United States is a party. These

are enumerated in Sec. 3194 (e) (2). I believe this change reflects the board consensus of a significant portion of the international community as to what is not an offense of a political character.

With regard to acts or alleged acts which do not fall within the purview of any of the enumerated multi-lateral conventions, I would associate myself with the language proposed by the American Civil Liberties Union before this Subcommittee. I believe this to be, under prevailing circumstances, the most reasonable formulation and one which does not so seriously constrict the judicial function as would the provisions contained in H.R. 2643 as presently proposed. In short, once Congress moves beyond the acts which many countries with whom we enjoy good diplomatic relations would uniformly designate as extraditable offense, Congress should honor the time-honored function of the judiciary <sup>jurisdiction</sup> in the definition of political offenses. Failure to do so will unnecessarily limit the role of the judiciary in extradition matters and render it a handmaiden of executive policy. To the greatest extent possible, our extradition law should be removed from the possible taint of prejudice against persons seeking freedom in many parts of the world.

As for the rights of the person sought to be extradited at and before the extradition hearing, I would propose that Sec. 3194 (b) (1) be amended to include the right to:

Discover information in the possession of the United States bearing upon the issues before the Court pursuant to the Federal Rules of Criminal Procedure.

I would also like to record my opposition to providing that the United States will provide legal representation to the requesting State. To empower the Attorney General to file a complaint and appear before a judge in any extradition proceedings is objectionable on several grounds (a) it further taxes the resources of the Department of Justice and (b) it unfairly disadvantages the respondent because of the status of the representative of the demanding State and because of the ability of the Attorney General to channel legal resources to a given extradition case. For instance, in one highly publicized extradition case, the U.S. Attorney for the Northern District of Illinois himself headed a team of lawyers on behalf of the demanding State.

I believe that the Court should be empowered in extradition proceedings to deny extradition if the Court finds that a person's life or freedom would be threatened in the requesting State on account of his or her race, religion, nationality, membership in a particular group, or political opinion. I would add such a limitation to Sec. 3194 (a) (2).

I would respectfully suggest a change in the provisions regarding surrender of a person to a foreign state after hearing. Sec. 2196 should be amended to include the following provision:

If a person is found extraditable pursuant to Section 3194, that person shall have the right to petition the Secretary of State for an order refusing surrender to the requesting state, or

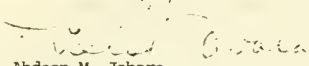
conditioning surrender of such conditions as will assure compliance with this act and international law and otherwise serve the interest of justice. The Secretary may, at his discretion, provide a hearing or decide the petition on the basis of written evidence and arguments alone. A final decision adverse to the petitioner shall be in writing, and shall include findings of fact and conclusions of law which are responsive to the petition. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting each of the respective findings.

The Secretary of State shall condition the surrender of a person ordered extraditable by a court upon such conditions as will assure compliance with international law, including international law relating to the protection of human rights, at all stages of the requesting State's legal proceedings, including pre-trial detention and interrogation, trial and punishment.

3196 (b) The surrender of a person who has been ordered extraditable shall be conditioned on the requesting State's assurance that the person will not be detained, tried or punished in the territory of the requesting State for an offense other than that for which extradition has been granted, nor be extradited by that State to a third State.

I greatly appreciate your solicitation of my views on this most important matter and trust that my consideration of the issues will assist the Subcommittee in its deliberations and formulation of a just extradition law.

Very truly yours,

  
Abdeen M. Jabara

AMJ/rlb:

LAW OFFICES OF  
**TOPEL & GOODMAN**  
 A PROFESSIONAL CORPORATION  
 872 SANSOME STREET, FOURTH FLOOR  
 SAN FRANCISCO, CALIFORNIA 94111  
 TELEPHONE (415) 421-6140

MARCUS S. TOPEL  
 WILLIAM M. GOODMAN  
 MARIANNE BACHERS

May 31, 1983

Congressman William J. Hughes  
 Chairman  
 Subcommittee on Crime  
 Committee on the Judiciary  
 House of Representatives  
 Washington, D.C. 20515

RE: H.R. 2643, Extradition Act of 1983

Dear Congressman Hughes:

I am writing to comment on some of the proposed changes in H.R. 2643 which Virginia Sloan was kind enough to send to me.

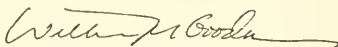
I agree with the proposed amendments to section 3194(e) (2) and (e) (3). The proposed amendments will clearly incorporate into the statute the present case law definitions of the political offense exception. In my opinion, the factors set forth in section 3194(e) (2) (G) and 3194(e) (3) (A)-(F) encompass all the elements which could be considered in applying the political offense exception to any set of facts, outside of those facts expressly excluded by section 3194(e) (2). I believe that most prosecutors, defense attorneys, and judges would favor the proposed amendments because the amendments incorporate the present case law and, at the same time, refine the political offense standards in a workable, understandable fashion.

I am also gratified that section 3192(d) (2) (c) has been eliminated, since that provision placed an unreasonable burden on the defendant seeking bail release. I believe that the substitution of section 3192(d) (4) still injects an irrelevant issue into the bail release process. I would urge, at the very least, elimination of the mandatory language in that section. The section should, at most, include discretionary language allowing a court to consider the impact of a bail order on a foreign state relationship. The present section creates the impression that the foreign state relationship impact is of paramount importance in bail release decisions.

I submit that the risk of flight and danger to the community are and should be the only meaningful considerations in bail release decisions.

I am sorry that I could not attend and testify at the May 5, 1983 hearing. I hope these additional written comments will be of assistance to the Subcommittee.

Yours very truly,



WILLIAM M. GOODMAN

WMG:me  
 cc: Virginia Sloan

LAW OFFICES OF  
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 832 SANSOME STREET, FOURTH FLOOR  
 SAN FRANCISCO, CALIFORNIA 94111  
 TELEPHONE (415) 421-6140

MARCUS S. TOPEL  
 WILLIAM M. GOODMAN  
 MARIANNE BACHERS

Summary of the Written Statement of  
 William M. Goodman

I favor most of the provisions of H.R. 2643. I strongly support the retention of the jurisdiction of the courts to decide the political offense exception. The language defining the political offense exception in §§3194(e)(2) and (e)(3) is a reasonable attempt to establish the scope of the political offense exception in a manner largely consistent with the present case law.

The substantially modified Bail Reform Act provisions of §3199 should definitely be incorporated into the reform of international extradition procedures. I disagree, however, with inclusion of §3192(d)(2)(c), and §3199(c)(10)(B)(iii). The provision is excessively ambiguous and, in any event, concerns matters which are both largely unprovable and irrelevant to a fair and impartial bail release decision. The government's burden of proof under §3199(c)(10)(B) should be "clear and convincing" evidence, rather than a preponderance of the evidence.

I disagree with §3194(d)(2)(A) which measures the statute of limitations only by the requesting party's law if the treaty does not include a statute of limitations defense.

I agree with the bilateral right to appeal (§3195(a)(1)), the re-filing limitations (§3192(a)(2)), and the venue change provision (§3192(c)). I disagree with the potentially unlimited extension provisions for the provisional arrest warrant period. (§3192(e)) I find the provisions of §3194(d)(1)(C) excessively mechanical and unnecessary to achieve the apparent goal of determining trends in the law.

SEP 6 1983

## American Bar Association

SECRETARY  
William H. Neukom  
1000 Norton Building  
Seattle, WA 98104

WRITER'S DIRECT LINE 312/947-4019

August 17, 1983

(6)

Honorable Peter W. Rodino, Jr.  
Chairman, Committee on the Judiciary  
U. S. House of Representatives  
Washington, DC 20515

RE: International Extradition Practices

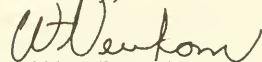
Dear Mr. Chairman:

At the meeting of the House of Delegates of the American Bar Association held August 2-3, 1983, the attached resolution was adopted upon recommendation of the Sections of International Law and Practice and Criminal Justice. The action taken thus becomes the official policy of the Association in this matter.

This resolution is transmitted for your information and whatever action you may deem appropriate. If hearings are scheduled on the subject of this resolution we would appreciate your advising Robert D. Evans, Director of the American Bar Association Governmental Affairs Group, 1800 M Street, N.W., Washington, D.C. 20036, (202/331-2210.)

Please do not hesitate to let us know if you need any further information, have any questions or if we can be of any assistance.

Sincerely,



William H. Neukom

WHN:fel  
Attachment  
4793T/4824T

cc: Mark R. Joelson, Esquire  
Chairman, Section of International Law  
and Practice  
Richard H. Kuh, Esquire  
Chairman, Section of Criminal Justice  
Sidney S. Sachs, Esquire  
L. Stanley Chauvin, Esquire  
Robert D. Evans, Esquire



REPORT NO. 104A

BE IT RESOLVED, That the American Bar Association:

1. Recognizes the need for the early enactment of legislation modernizing U.S. international extradition practices along the lines proposed in S.220 "The Extradition Act of 1983," introduced in the Senate on January 27, 1983, or approved by the Committee on the Judiciary of the House of Representatives in Report No. 97-627, part I, June 24, 1982, regarding the Extradition Act of 1982;

2. Strongly recommends that the legislation:

(a) preserve the jurisdiction of federal courts to make the initial determination whether extradition is barred by the political offense exception to extradition,

(b) exclude all acts of terrorist violence from the application of the political offense exception, particularly those denounced by multilateral conventions to prevent and punish acts of international terrorism,

(c) preclude the application of the political offense exception from offenses which constitute serious breaches of the norms established under international humanitarian law applicable in international and non-international armed conflicts, without subjecting to extradition combatants for warlike acts which do not transgress those norms,

(d) provide that a person sought for extradition shall be entitled to bail under the same conditions as though he were charged with an offense against the United States unless the Government establishes by a preponderance of the evidence that: (1) such person has fled the requesting nation to avoid prosecution or confinement on the charge for which extradition is sought; or (2) the failure to detain such a person will adversely affect, in a significant way, the relations of the United States with the requesting nation.



*Church  
of the  
Brethren*

August 19, 1983

WASHINGTON OFFICE / 110 MARYLAND AVENUE N.E. BOX 50 / WASHINGTON, D.C. 20002

PHONE (202) 546-3202

Dear Representative:

As the Judiciary Committee considers the extradition bill, H.R. 3370, we urge you to consider amendments to improve protections for the persons accused of crimes by foreign governments. We urge that accused persons be provided with the same due process to which citizens are entitled in conformity with the principle that we should treat others as we would be treated. We regard this as not only a religious principle, but one widely accepted in our society as a standard of justice.

We are concerned that the bill, while much improved by the subcommittee, still poses great risks of abuse by foreign governments whose judicial processes are less trustworthy. So long as the charge of conspiracy is shielded from inquiry into its political motivation, this charge may be used to persecute political opponents who have no real connection to the crime which serves as the basis for the charge. Similarly, there needs to be more explicit authorization for inquiry into a foreign government's past treatment of extradited persons and the possible political motivation of criminal charges. It would be unthinkable to entrust the life and liberty of an accused person to a government guilty of gross violations of human rights following the same standard we would employ with regard to a government with more reliable judicial procedures. Such an inquiry is essential to our national commitment to seek international protection of human rights.

Thank you for your consideration of our views.

Respectfully,

*Ralph Watkins*

Ralph Watkins  
Legislative Associate

Paul Kittlaus  
Director, Washington Office  
United Church of Christ

William Weiler  
Washington Office  
Episcopal Church

Robert Z. Alpern  
Washington Office  
Unitarian Universalist Association

J. Michael Myers  
Washington Representative  
Church World Service  
Immigration and Refugee Program

Rabbi Irwin M. Blank  
Washington Representative  
Synagogue Council of America

NORTHWESTERN UNIVERSITY  
SCHOOL OF LAW  
357 EAST CHICAGO AVENUE  
CHICAGO, ILLINOIS 60611

August 23, 1983

Ms. Virginia Sloan  
Assistant Counsel  
Subcommittee on Crime  
U.S. House of Representatives  
207 Cannon House Office Building  
Washington, D.C. 20515

Dear Ms. Sloan:

I am writing to express my views concerning the treatment of the political offense exception found in H.R. 3347. I believe that this bill provides a definition of the political offense exception which would strengthen significantly the American stance against terrorism, while maintaining sufficient flexibility to provide asylum to legitimate dissidents.

By flatly excluding certain crimes from the exception, Section 3194(e)(2) makes it clear that certain conduct is extraditable and punishable, no matter how "political" its motivation. In this regard, Subsection (E) is obviously framed so as to exclude acts of terrorism from the political offense exception. Furthermore, this exclusion is a broad one, since it is phrased in terms of "extreme indifference to the risk \*\*\* to persons not taking part in armed hostilities." Thus, even offenses aimed at military targets would not be protected if they involved extreme indifference to civilian casualties. See, e.g., In re McMullen, for a case involving injury to a civilian as the result of an assault on a military installation.

H.R. 3347 does not, however, exclude all acts of violence from the political offense exception. This is entirely consistent with American foreign policy; since our own revolutionary birth we have recognized the right of rebellion against an unjust regime. Indeed, at this precise moment our government is providing support to armed insurgents in Nicaragua, not to mention our support of Mr. Habre, who came to power as a rebel in Chad. Whatever one may think of the policies underlying these decisions, it is obvious that the American tradition does not per se condemn the use of political violence.

The task of the political offense exception, therefore, is to separate terrorism from what might be called legitimate rebellion. Section 3194(e)(2)(E) accomplishes this goal.

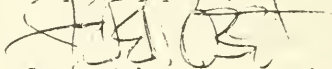
With regard to acts of political violence which do not amount to terrorism, Section 3194(e)(3) allows the court of extradition to consider the circumstances of the offense in order to determine the applicability of the political offense exception. Thus, acts of violence against the state are neither ruled in nor ruled out of the exception. Rather, the court is called upon to apply a balancing test considering the status of the victim, the existence of an uprising, the political involvement of the offender, the seriousness of the offense, and other relevant factors.

This approach is definitely broader in its dispensation of asylum than was the blanket exclusion of all acts of violence which was included in prior drafts of the Extradition Reform Act. See, e.g., H.R. 2643. It is important to note, however, that H.R. 3347 nonetheless contains a more restrictive definition of the political offense exception than does much of the recent case law. For example, Section 3194(e)(3) makes it clear that mere contemporaneity with a civil uprising will not be sufficient in and of itself to require the application of the political offense exception. Furthermore, the burden of proof provision of Section 3194(d)(2)(C) makes it clear that the court of extradition will begin with the presumption that the political offense exception does not apply. The defendant will be required to prove that the offense is political.

The primary virtue of Section 3194(e)(3) is its flexibility. It allows a court to examine the circumstances of certain offenses (although not those which amount to terrorism), and to avoid the anomaly of requiring the extradition of somebody like Lech Walesa. Finally, by eliminating the troublesome term "extraordinary circumstances," H.R. 3347 eliminates the need to define those words through future litigation and harmonizes the definitional section with the requirement of proof by a preponderance of the evidence.

Thank you for the opportunity to state my opinions. Please let me know if you have any questions.

Very truly yours,



Steven Lubet  
Professor of Law

SL:m1

**HUMAN RIGHTS** • 36 WEST 44TH STREET, NEW YORK, NY 10036, (212) 921-2160

Arthur C. Helton  
DIRECTOR  
POLITICAL ASYLUM PROJECT

TO: Selected Members of Congress

FROM: Arthur C. Helton

RE: H.R. 3347

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Telford Taylor

The bill to reform international extradition is scheduled for markup before the full House Judiciary Committee on Tuesday, October 4, 1983. Attached to this memorandum is a copy of our testimony before the Subcommittee on Crime of the Judiciary Committee on May 5. The testimony focuses on two issues: the definition of what constitutes a "political offense" and thus a defense to extradition, and the role of the courts in assessing whether a request for extradition is really a pretext for persecution by the requesting country. In our view, a bona fide refugee should not risk extradition for a political offense or as a pretext for persecution. The amendments to the bill by the Subcommittee address only some of our considerations in this regard.

As to the political offense defense, the Subcommittee limited those crimes that can never constitute a political offense, and codified the definition of political offense enunciated in In re Castioni, a nineteenth century British case. While these changes ameliorate the concerns set forth in our prior testimony to some extent, the standards are still overly formalistic. Rather, they should be more flexible and involve a factor analysis, corresponding to the inquiry in the asylum area.

As to the role of the courts in assessing whether a request for extradition is a pretext, the Subcommittee retained current law permitting such an inquiry under appropriate circumstances. While this outcome addresses many of the concerns set forth in our testimony, it would be desirable to avoid any ambiguity and make express the authority of the courts to make the inquiry in question.

If you have any questions concerning these matters, then please do not hesitate to contact me.

STATEMENT OF ARTHUR C. HELTON  
ON  
U.S. EXTRADITION AND ASYLUM POLICY

before the  
SUBCOMMITTEE ON CRIME OF THE  
COMMITTEE ON THE JUDICIARY  
U.S. HOUSE OF REPRESENTATIVES

MAY 5, 1983



INTRODUCTION

Chairman Hughes, thank you for inviting me to appear at today's hearing. My name is Arthur Helton. I am the director of the Political Asylum Project of the New York based Lawyers Committee for International Human Rights.

Since 1978, the Lawyers Committee has been a public interest law center working in the areas of international human rights, refugee and asylum law. The Political Asylum Project of the Committee was created in late 1980 to provide representation to individual asylum applicants in the United States. The Project utilizes volunteer lawyers whom it trains and supervises. Since 1978, the Lawyers Committee has represented more than 250 asylum applicants from over 30 countries. Based on this experience, the Committee has testified in Congress and prepared papers on various asylum and refugee policy matters.

Our testimony today concerns H.R. 2643, a bill to amend Title 18 of the United States Code with respect to extradition. In particular, I wish to comment upon the proposed provisions concerning the "political offense" exception to extradition, including the standards by which to determine whether an offense is political in character. I also wish to comment upon the need to maintain the power of the courts to inquire into whether a request for extradition is a mere pretext for persecution on account of race, religion,

nationality, membership in a particular social group and political opinion. In our view, the political offense analysis should be the same as that utilized in the refugee area, and federal court jurisdiction should be retained in order to square the extradition procedure with United States law and treaty obligations regarding the treatment of persons who apply for political asylum in the United States.

#### THE PROPOSED POLITICAL OFFENSE EXCEPTION

The bill codifies prior law in that a person whose extradition is sought is permitted to raise as a defense the fact that the offense in question was a "political offense."<sup>1/</sup> Prior law is modified in the bill in that certain offenses, such as airplane hijacking, are excepted absolutely from the term "political offense."<sup>2/</sup> Others, including certain crimes of violence, are excepted, absent the existence of "extraordinary circumstances."<sup>3/</sup> No standards are set forth in the bill to define what circumstances should be deemed "extraordinary." This concept was introduced in a predecessor bill in the 97th Congress to add an element of flexibility to the "political offense" analysis.<sup>4/</sup> In fact, however, it simply engrafts onto the analysis a limited inquiry into the circumstances surrounding the commission of some offenses. The traditional, formalistic notion of what is a "political offense" is otherwise retained.

THE TRADITIONAL POLITICAL OFFENSE EXCEPTION

The standard employed by the courts in the United States to determine whether extradition should be refused on the grounds that the offense in question is a political one is derived from a leading nineteenth century British case, In re Castioni,<sup>5/</sup> which provide that such offenses must be "incidental to and [have] formed a part of political disturbances." Relatively few American courts have addressed the issues recently. Two recent American cases, Matter of Mackin,<sup>6/</sup> in which extradition was denied, and Eain v. Wilkes,<sup>7/</sup> in which it was permitted, serve to illustrate the prevailing standard.

In Mackin, the court reviewed the case law and distilled the following factors to determine whether the offense in question was political:

- (1) whether there was a war, rebellion, revolution or political uprising at the time and site of the commission of the offense;
- (2) whether Mackin was a member of the uprising group; and
- (3) whether the offense was "incidental to" and "in furtherance of" the political uprising.<sup>8/</sup>

Mackin involved a request by the United Kingdom for the extradition of a member of the Provisional Irish Republican Army (PIRA) for the attempted murder of a British undercover soldier. As to the existence of a political

uprising, the court concluded that "...there was a political conflict in Andersontown, Belfast, Northern Ireland in March of 1978 which was part of an ongoing political uprising, fluctuating in intensity, but nevertheless of sufficient severity to satisfy the first prong of the political offense exception."<sup>9/</sup> The court's determination relied on:

- (1) the high level of violence in the area at that time;
- (2) the presence of 13,000 British troops, 420 of whom were stationed in Andersontown to contain the violence;
- (3) the existence of three British army forts in the immediate locale;
- (4) the establishment of special non-jury courts by emergency legislation to deal with the rise in terrorism;
- (5) the derogations filed by the United Kingdom from the European Convention on Human Rights to allow it to forego its obligations thereunder by virtue of the existence of a "public emergency threatening the life of a nation;" and
- (6) the campaign of violence maintained by the PIRA aimed at British army and Loyalist forces, against British Dominion of Northern Ireland, and in support of a unified, independent Irish nation.<sup>10/</sup>

As to Mackin's membership in the uprising group, the court found that the requisite connection to the group had been established. The alleged acts were in conformity with a member's general functions in the PIRA, and Mackin "bore no personal ill-will or malice toward the victim-soldier."<sup>11/</sup>

As to the question of whether the act was "incidental to" and "in furtherance of" a political disturbance, the court found that while the acts had not been "pre-planned and directed by the PIRA" the requisite "substantial tie" between the alleged offense and the political activity and goals of the group had been shown in the "necessity of the situation."<sup>12/</sup>

The second case, Eain v. Wilkes<sup>13/</sup> involved a Jordanian national and a member of the Fatah faction of the Palestine Liberation Organization (PLO) whose extradition to Israel was requested on charges of murder and aggravated harm. Eain was alleged to have planted a bomb in the market area of Tiberias during a Jewish religious festival and youth rally. The blast had killed two boys and maimed and/or injured 36 other persons.

As to the political disturbance requirement, the court noted that it must constitute a "war, revolution or rebellion." The court distinguished the nature of the conflict in Israel from other disturbances where the political offense exception had been sustained, explaining that those "cases involved ongoing, organized battles between contending armies, a situation which, given the express nature of the PLO, may be distinguished."<sup>14/</sup>

As to the question of whether or not the act was "incidental to" and "in furtherance of" a political uprising,

the court held that there had been a failure to prove a direct link between the bombing and the political goals of the PLO. The individual's motives in committing the offense, furthermore, was held to have no bearing on the political character of the act.<sup>15/</sup>

The applicability of the political offense exception to terrorist attacks was limited in Eain as well. The court relied on another nineteenth century British case which excluded from acts classified as "political offenses" those which are "directed primarily against the separate body of citizens." The case involved a bombing of an army barracks and a Parisian cafe by an anarchist. The political exception was held not to apply on the ground that "the party of anarchy is the enemy of all government."<sup>16/</sup> The court in Eain identified the following factors as relevant to the determination:

- (1) the civilian status of the victims and the randomness of their selection; and
- (2) the objectives supposed common to both terrorist and anarchist activity, namely "the destruction of a political system by undermining the social foundation of the government."<sup>17/</sup>

The court drew the distinction between terrorist activity and activity eligible to be classified as political offenses as the difference between "acts that disrupt the political structure of the state," and those that disrupt



"the social structure that established the government."  
 Terrorist activity, unlike political activity conforming to the test, "seeks to promote social chaos," in contrast to activity occurring in the context of "[a]n ongoing, defined clash of military forces."<sup>18/</sup>

The court applied these principles and found that the bombing failed to qualify as a political offense only because of its specific character as an "isolated act of violence." The PLO, the court found, "directs its destructive forces at a defined civilian populace" to further its aim of "[destroying] the Israeli political structure as an incident of the expulsion of a certain population from the country."<sup>19/</sup> There was no proof that the bombing was linked to PLO political and strategic objectives, particularly in view of the "terrorist" character of those objectives.

#### THE RULE OF JUDICIAL NON-INQUIRY

H.R. 2643 also prohibits the courts from inquiring into the background of an extradition request. That prerogative is left with the Secretary of State.<sup>20/</sup> This is at variance with current law.

Under current law, the courts, while ordinarily declining to withhold extradition, reserve the right to inquire into the background of an extradition request. The leading case is Gallina v. Fraser,<sup>21/</sup> in which the court

rejected the claim of the individual in question that upon return to Italy he would be imprisoned without a new trial and an opportunity to face his accusers or to conduct any defense. The court explained that proceedings in foreign courts did not have to conform to American concepts of due process, and that the court was without authority "to inquire into procedures which wait the accused upon extradition."

The ruling in Gallina has been followed in a number of cases.<sup>22/</sup>

Nevertheless, the principle of judicial self-restraint expressed in Gallina is not absolute. Indeed, the Gallina court itself noted that "[w]e could imagine situations where the relator, upon extradition, would be subject to procedures or punishment so antipathetic to a federal court's sense of decency as to require re-examination of [the] principle [of non-inquiry]. This is not such a case."<sup>23/</sup>

In another case, Matter of Sindona,<sup>24/</sup> where the accused also alleged that he would be denied a fair trial if extradicted to Italy, the court did, in fact, discuss the nature of Italy's judicial procedures. In rejecting the individual's claim, the court emphasized that Sindona has

"not even made a threshold showing that he would be subject to procedures in Italy that he would be so violative of human rights as to prevent extradition. There is no indication that the materials submitted by Sindona that the Republic of Italy subjects accused persons

to anything approaching summary proceedings or kangaroo courts which occur in nations which disregard human rights. Italy has a criminal justice system which comports with standards of the civilized world."<sup>25/</sup>

The Italian government, the court noted, is "evidencing its intention and ability to keep the criminal justice system functioning in a proper manner."<sup>26/</sup>

In other cases, courts implicitly have made judgments about the quality of the judicial safeguards in the requesting country. For instance, in Magasino v. Locke,<sup>27/</sup> the court rejected the claim that evidence against the defendant had been obtained pursuant to an illegal wiretap, explaining that "we hold the Canadian courts in the highest respect and entertain no doubt that, if appellant is tried in Canada, the Canadian courts will afford appropriate protection to appellant under pertinent Canadian law."<sup>28/</sup>

A concern with the fairness of the foreign judicial system may also have formed the basis of the court's denial of an extradition request by Greece in another case, In re Mylonas.<sup>29/</sup> There, the court ruled that a delay of three years between the initial proceeding against Mylonas and the Greek government's request violated the terms of the relevant extradition treaty. While grounding is holding on the three-year lapse, the court also noted that the original hearing in Greece had been held in absentia, without the defendant's knowledge, without giving him legal

representation, and with no opportunity to cross-examine adverse witnesses or to present favorable evidence.

#### OUR CONCERNS

The other side of the political offense exception to extradition is the decision whether to grant political asylum in the United States to an alien who has been convicted of a crime. The nature of the inquiry and the standards employed in the extradition area should be the same as those in the asylum area. Otherwise, a refugee may be extradited to face persecution. It is instructive, then, to refer to the procedures and standards by which it is determined whether a crime is political in nature and, therefore, does not preclude a grant of asylum.

An alien merits political asylum in the United States if he has been persecuted or has a well-founded fear of persecution upon return to his country of national origin on account of race, religion, nationality, membership in a particular social group, or political opinion.<sup>30/</sup> An application for asylum, however, can be denied if there are "serious reasons for considering that the alien has committed a serious non-political crime outside the United States...."<sup>31/</sup>

The statute and regulations do not define what constitutes a serious, non-political crime. In a leading administrative case, the Board of Immigration Appeals looked to the United Nations' High Commissioner's Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees (Geneva 1979) ("Handbook") in order to decide the issue.<sup>32/</sup>

The Handbook provides specific guidance in determining what constitutes a political offense. It teaches that the inquiry should focus upon the nature and purpose of the offense in question, including motive; and the relationship between the offense and its alleged political purpose and objective, including whether the offense is grossly out of proportion to the alleged objective. It states in pertinent part:

In determining whether an offence is "non-political" or is, on the contrary, a "political" crime, regard should be given in the first place to its nature and purpose, i.e., whether it has been committed out of genuine political motives and not merely for personal reasons or gain. There should also be a close and direct causal link between the crime committed and its alleged political purpose and object. The political element of the offence should also outweigh its common-law character. This would not be the case if the acts committed are grossly out of proportion to the alleged objective. The political nature of the offence is also more difficult to accept if it involves acts of an atrocious nature (§ 152).

What constitutes a "serious" non-political crime for the purposes of this exclusion clause is difficult to define, especially since the term "crime" has different connotations in different legal systems. In some countries the word "crime" denotes only offences of a serious character. In other countries it may comprise anything from petty larceny to murder. In the present context, however, a "serious" crime must be a capital crime or a very grave punishable act. Minor offences punishable by moderate sentences are not grounds for exclusion under Article 1 F (b) even if technically referred to as "crimes" in the penal law of the country concerned (§ 155).

\* \* \*

In applying this exclusion clause, it is also necessary to strike a balance between the nature of the offence presumed to have been committed by the applicant and the degree of persecution feared. If a person has well-founded fear of very severe persecution, e.g., persecution endangering his life or freedom, a crime must be very grave in order to exclude him. If the persecution feared is less serious, it will be necessary to have regard to the nature of the crime or crimes presumed to have been committed in order to establish whether the applicant is not in reality a fugitive from justice or whether his criminal character does not outweigh his character as a bona fide refugee (§ 156).<sup>33/</sup>

In terms of the nature of review in the asylum context, there is initial administrative review of an alien's asylum claim, including whether the alien has committed a <sup>34/</sup>serious, non-political offense. In deportation proceedings, an adverse determination by the agency can be reviewed by a petition for review to the appropriate Circuit Court of



Appeals, with further review available in the United States Supreme Court.<sup>35/</sup> In exclusion proceedings, an adverse agency decision can be reviewed via habeas corpus in the appropriate District Court, with further review available in the Circuit Court and Supreme Court.<sup>36/</sup> The courts, moreover, have not hesitated to review asylum cases.<sup>37/</sup> In sum, judicial review is available in the consideration of an asylum claim, including the resolution of the question of whether an offense is "political" in character.

Two cases, Matter of McMullen in which extradition was denied,<sup>38/</sup> and Matter of Sindona in which it was permitted,<sup>39/</sup> provide useful illustrations of the relationship between international extradition and the refugee/asylum areas. They also demonstrate the competence of the courts to decide the persecution issue.

McMullen involved a request for extradition to the United Kingdom in connection with the 1972 bombing of a British army barracks in North Yorkshire. McMullen had deserted the British army in 1972, when he became involved with the Provisional Irish Republican Army (PIRA). In 1974 an Irish court had convicted him of PIRA membership and of carrying firearms and had sentenced him to three years in prison. Upon his release, the PIRA sought to recruit him for further service and threatened reprisals when he declined. McMullen escaped to the United States, where he was arrested

for carrying a false passport. Scotland Yard detectives were permitted to question him about his participation in past PIRA activities, whereupon the United Kingdom demanded his extradition. A federal magistrate, however, found that the act alleged met the traditional criteria for the political offense exception and denied the request.

Subsequently, the Immigration and Naturalization Service attempted to deport McMullen to Northern Ireland. McMullen invoked the withholding of deportation provisions of the Immigration and Nationality Act,<sup>40/</sup> which forbids the deportation of persons likely to suffer political persecution. He claimed that the Irish authorities could not prevent the PIRA from persecuting him. The court disallowed his deportation on that basis.

The second case, Matter of Sindona, involved a charge of the Italian crime of "fraudulent bankruptcy." Sindona argued that he was exempt from extradition under the Protocol Relating to the Status of Refugees which precludes the expulsion or return of a refugee whose life or freedom would be threatened, inter alia, on account of his political opinion. His theory was that the Protocol "creates a broader exception to the extradition power than does the language of the Italo-American treaty as to an offense of a political character."<sup>41/</sup> The court drew attention to the

limiting language of Article 1F, which denies applicability of the provisions of the Convention "...to any person with respect to whom there are serious reasons for considering that...(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee..."<sup>42/</sup> The court's rejection of the political offense claim, however, was held to effectively rule out appeal to the Protocol.

To the extent that the courts do not review the political offense determination, then, to that extent, asylum applicants risk a peculiar anomaly. In particular, an asylum seeker may be granted asylum because of the political character of the offense in question, but extradited to face persecution if the Secretary of State disagrees about the character of the offense for whatever reason. The Department of State plays only an advisory role in asylum adjudications.<sup>43/</sup> To give the Secretary of State an exclusive role in the extradition context would introduce the risk that the decision would be made as a matter of political convenience rather than based upon neutral principles. Review by the independent judiciary should be maintained in the extradition context.

CONCLUSION

There are many countries throughout the world that are unable, or unwilling, to provide the protections guaranteed by our judicial system. In many countries where a pattern of human rights violations are occurring, it is often the case that political opponents of the government are charged with criminal law violations. These charges are the pretext for arbitrary detention, in some cases without a proper trial or due process of the law. In these situations it would be highly inappropriate for the United States to grant an extradition request involving a political opponent of the requesting government.

A decision by the State Department to grant extradition without adequate judicial review would raise a distinct possibility that innocent people would be extradited and returned to face persecution in their home country. Moreover, governments that wish to take reprisals against their political opponents living in exile would simply charge them with violation of the criminal law as a means of securing their extradition. The most appropriate way to protect against these abuses would be to maintain the role of an independent judiciary in the extradition process.

## FOOTNOTES

1. The court shall not order a person extraditable after a hearing under this section if the court finds...the person has established by the preponderance of the evidence that any offense for which such person may be subject to prosecution or punishment if extradited is a political offense. Section 3194(d)(2)(C).
2. For the purposes of this section, a political offense does not include --
  - (A) an offense within the scope of the Convention for the Suppression of Unlawful Seizure of Aircraft (signed at The Hague on December 16, 1970);
  - (B) an offense within the scope of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (signed at Montreal on September 23, 1971);
  - (C) a serious offense involving an attack against the life, physical integrity, or liberty of internationally protected persons (as defined in section 1116 of this title), including diplomatic agents;
  - (D) an offense with respect to which a multilateral treaty obligates the United States to either extradite or prosecute a person accused of the offense;
  - (E) an offense that consists of the manufacture, importation, distribution, or sale of narcotics or dangerous drugs; or
  - (F) an attempt or conspiracy to commit an offense described in subparagraphs (A) through (E) of this paragraph, or participation as an accomplice of a person who commits, attempts, or conspires to commit such an offense. Section 3194(e)(2).
3. For the purposes of this section, a political offense, except in extraordinary circumstances, does not include--
  - (A) an offense that consists of homicide, assault with intent to commit serious bodily injury, kidnaping, the taking of a hostage, or a serious unlawful detention;
  - (B) an offense involving the use of a firearm (as such term is defined in section 921 of this title) if such use endangers a person other than the offender;
  - (C) rape; or
  - (D) an attempt or conspiracy to commit an offense described in subparagraph (A), (B), or (C) of this paragraph, or participation as an accomplice of a person who commits, attempts, or conspires to commit such an offense. Section 3194(e)(3).

4. H.R. Rep. No. 97-627, Part I, 97th Cong. 2d Sess. 24 (1982).
5. [1891] 1 Q.B. 149.
6. No. 80 Cr. Misc. 1, slip op. at 54 (S.D.N.Y. Aug. 13, 1981), habeas corpus denied, 668 F.2d 122 (2d Cir. 1981).
7. 641 F. 2d 504 (7th Cir. 1981), cert. denied, 454 U.S. 894 (1981).
8. 668 F.2d 122 at 125.
9. No. 80 Cr. Misc. 1, slip op. at 54 (S.D.N.Y. Aug. 13, 1981).
10. Id.
11. Id.
12. Id.
13. 641 F. 2d 504 (7th Cir. 1981), cert. denied, 454 U.S. 894 (1981).
14. Id. at 519.
15. Id. at 520.
16. Id. at 521, citing In re Meunier, [1894] 2 Q.B. at 419.
17. Id. at 521.
18. Id. at 521-522.
19. Id. at 520 n. 19.
20. Any issue as to whether the foreign state is seeking extradition of a person for the purpose of prosecuting or punishing the person because of such person's political opinions, race, religion, or nationality shall be determined by the Secretary of State in the discretion of the Secretary of State. Any issue as to whether the extradition of a person to a foreign state would be incompatible with humanitarian considerations shall be determined by the Secretary of State in the discretion of the Secretary of State. Section 3194(e)(4)(A) and (B).



21. 278 F.2d 77 (2d Cir. 1960).
22. See, Matter of Sindona, 450 F. Supp. 672 (S.D.N.Y. 1978), aff'd, sub nom. Sindona v. Grant, 619 F.2d 167 (2d Cir. 1980) (upholding extradition to Italy; argument about the fairness of a trial in the requesting country "was not properly addressed to a court in an extradition hearing but must be made to the Department of State, which has primary responsibility for determining whether treaties with foreign countries are being properly respected...and (which) has authority to deny extradition on humanitarian grounds, 'if it appears unsafe to surrender Sindona to Italian authorities.'"); Garcia-Guillern v. United States, 450 F.2d 1189 (5th Cir. 1971) (sustaining extradition to Peru; "... (we are) not permitted to inquire into the procedures which await the appellant upon his return); In re Ryan, 360 F. Supp. 270 (E.D.N.Y. 1973) (upholding extradition to West Germany; "extraditing court will not inquire into procedures awaiting detainee upon extradition; 'the conditions under which a fugitive is to be surrendered to a foreign country are to be determined solely by the non-judicial branches of the government.'")
23. 278 F.2d 77 at 79.
24. 450 F. Supp. 672 (S.D.N.Y. 1978), aff'd sub nom. Sindona v. Grant, 619 F.2d 167 (2d Cir. 1980).
25. 450 F. Supp. at 695.
26. Id. at 695.
27. 545 F.2d 1228 (9th Cir. 1976).
28. 545 F.2d 1228 at 1230. See also, Peroff v. Hylton, 542 F.2d 1247 at 1249 (4th Cir. 1976), where the court upheld Sweden's extradition request, noting "(t)here is no basis for suspecting Sweden's criminal processes, or supposing that Sweden cannot and will not adequately provide for Peroff's protection...".
29. 187 F. Supp. 716 (N.D. Ala. 1960).

30. 8 U.S.C. §§ 1101(a)(42), 1158. See Stevic v. Sava, 678 F.2d 401 (2d Cir. 1982), cert. granted, 51 U.S.L.W. 3633, No. 82-973 (Feb. 28, 1983).
31. 8 U.S.C. § 1253(h)(2), 8 C.F.R. 208.8(f)(v). This exclusion provision corresponds to an exclusion clause under Article 1 of the United Nations Convention and Protocol.
32. Matter of Rodriguez-Palma, 17 I&N Dec. 465 (BIA 1980). The United States Court of Appeals for the Second Circuit has cited the Handbook as representing a restatement of the "High Commissioner's 25 years of experience, the practices of the governments acceding to the Protocol and literature on the subject." Stevic v. Sava, 678 F.2d 401, 406 (2d Cir. 1982), cert. granted, 51 U.S.L.W. 3633, No. 82-973 (Feb. 28, 1983).
33. The Handbook also considers the question of whether hijacking constitutes a serious non-political crime within the meaning of the exclusion clause (§§ 159-161). It basically concludes that the question should be "carefully examined in each individual case" under the general criteria of refugee recognition (§ 161).
34. 8 C.F.R. §§ 3.1(b), 208.1, 208.8(f)(iv) 208.9, 208.11, 236.7, and 242.21.
35. 8 U.S.C. § 1105a(a).
36. 8 U.S.C. § 1105a(b).
37. See, e.g., Reyes v. INS, 693 F.2d 597 (6th Cir. 1982), McMullen v. INS, 658 F.2d 1312 (9th Cir. 1981).
38. No. 2-78-1099 MG, slip op. (N.D.Cal. May 11, 1977).
39. 450 F. Supp. 672 (D.C.N.Y. 1978) aff'd sub nom. Sindona v. Grant, 619 F.2d 167 (2d Cir. 1980).
40. 8 U.S.C. § 1253(h).
41. Id. at 694.
42. Id. at 694.
43. 8 C.F.R. § 208.7.



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